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The Third Branch

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JANUARY 1982

CHIEF JUSTICE ISSUES YEAR-END REPORT

In his annual Year-End Report on the Judiciary, Chief Justice Burger took a wide-ranging look at judicial administration in 1981, the 75th anniversary of Roscoe Pound's address on "The Causes of Popular Dissatisfaction with the Administration of Justice." Copies of the 30-page report — highlighted below — are available from the Center's Information Service.

He pointed at the outset to the increase in filings at all levels of the federal judiciary, and the judges' response in the form of increased case terminations. Since there is "a limit to how long this trend of increased 'judicial productivity' should continue" — at some point it risks "eroding the quality of justice" — he stressed the need to "face up to the litigation explosion."

To that end, he reviewed steps taken in 1981 and earlier to discourage abuse of the litigation process, to deal with the special problems of protracted litigation, to improve the quality of litigation and lawyer competence, and to devise alternatives to traditional litigation.

He stressed that the quality of judges — and of the personnel and systems that support their work — is essential to effective judicial administration. The need for additional federal judgeships is "acute," he said, as is the need for attention to judicial compensation and benefit programs. The report reviewed last year's developments in federal and state judicial education programs, in providing automated support to all levels of the federal judiciary, and described 1981's inauguration of an experimental program of District Court Executives in five pilot courts. The report also described efforts "to help jurors perform their task, treat them with the respect they deserve, and use their time efficiently."

The Chief Justice hailed the October 1, 1981, reorganization of the old Fifth Circuit "after a decade of continued efforts and proposals" and called for "statutory division of the Ninth Circuit," since it is "infeasible for any appellate court to operate with twenty-three full-time circuit judges and eight senior judges."

The Chief Justice again urged congressional elimination of the Supreme Court's mandatory appellate jurisdiction, and reviewed other legislative efforts to provide increased appellate capacity "for important cases which the Supreme Court simply cannot review given its present caseload." It also remains, he said, "uncertain whether the Justices should set aside the time and effort required to examine proposed rules affecting the federal court system," and described various efforts in 1981 to analyze the federal rulemaking process.

INTERVIEW WITH JUSTICE POTTER STEWART

Justice Potter Stewart served on the Supreme Court almost 23 years until his retirement in July, 1981. Appointed in 1958 by President Eisenhower, he was the 15th Justice to come to the Court from Ohio, either by virtue of birth or residence.

Justice Stewart's previous judicial service was on the U.S. Court of Appeals for the Sixth Circuit from 1954 to 1958.

Justice Stewart is from Cincinnati, Ohio, where he returned to serve as City Councilman after a stint in a New York law firm and service in the U.S. Navy during World War II. He is a graduate of Yale Law School where he also obtained his undergraduate degree. In addition he did graduate work at Cambridge University, England.

See STEWART, p. 3

BERMANT TO DIRECT FJC INNOVATIONS AND SYSTEMS DEVELOPMENT DIVISION

On January 1, Dr. Gordon Bermant assumed the position of Director of the Federal Judicial Center's Division of Innovations and Systems Development, which has primary responsibility for the Center's efforts to help the federal courts use technology, including computers. Bermant replaces Dr. Jack R. Buchanan, who resigned as Division Director to accept a position in private industry.

In announcing the Board's approval of the appointment, FJC Director A. Leo Levin paid tribute to "the many top-flight computer science professionals on the Division's staff." The Division's ability to serve the federal courts, he noted, will be "enhanced by Dr. Bermant's extensive familiarity with the federal court system — with the judges and supporting personnel — and the richness of his management experience." Levin also expressed gratitude to Dr. Buchanan for his leadership of the Division.

Bermant has been with the Center for six years, serving most recently as Deputy Director of the Center's Research Division, and is nationally recognized for his research and development efforts in the courts and elsewhere. He has worked closely with the courts and with Judicial Conference committees in their search for improved methods of juror utilization and selection, in assessing the role of special masters in implementing judicial orders, and in evaluating the use of videotape in court proceedings.

Bermant earned his Ph.D. from Harvard University in 1961. Prior to joining the FJC, he was Project Director of the Law and Justice Study Center of the Battelle Seattle Research Center.

The Third Branch

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COMMISSION ON ACCREDITATION FOR CORRECTIONS ANNOUNCES SEMINARS

The Commission on Accreditation for Corrections, has announced two professional development seminars to provide information about the accreditation process. Established in 1974, the Commission has developed national correctional standards and implemented a voluntary accreditation program. At the end of 1980, nearly 600 individual correctional facilities and programs were actively involved in the accreditation process.

The Commission is a private non-profit organization composed of a 24-member Board of Commissioners. The Board consists of representatives from several kinds of correctional facilities as well as the American Bar Association, the American Institute of Architects, the American Medical Association, the Correctional Service of Canada and the National Sheriffs Association.

The seminars are to be held February 11 and 12 in Denver and March 11 and 12 in Atlanta. For more information write Commission on Accreditation for Corrections, 6110 Executive Boulevard, Suite 600, Rockville, MD 20852 or call Suzanne Burkhardt at (301) 770-3097.

CHIEF JUSTICE CALLS FOR EXPANSION OF PRISON INDUSTRIES

Chief Justice Warren E. Burger called for a new approach to corrections, including the development of an expanded prison industries program, in a speech hosted by the Lincoln Bar Association at the University of Nebraska. The Chief Justice asked whether an extensive prison construction program the country was beginning would lead to more "warehouses," or to "factories with fences around them where we will first train inmates and then have them engaged in useful production?"

If federal grant legislation for improved prison facilities is enacted, he stated, it is important that standards for such grants include "(a) conversion of prisons into places of education and training and into factories and shops for production; (b) a repeal of statutes which limit prison industry production; (c) an affirmative limitation against any form of discrimination against prison products; (d) a change in attitudes in organized labor and in the leaders of business toward the use of prison inmates to produce goods or parts."

"Creating prison industries," the Chief Justice said, "with incentives for good performance, would accomplish the dual objective of training inmates in gainful occupations and taking off the backs of the American taxpayers the enormous load of maintaining the prison systems of this country."

The Chief Justice stated that when society places a person be-

See PRISONS, p. 9

STEWART from p. 1

From the perspective of your 23 years of service, what do you feel have been the most significant changes in the Supreme Court and in the way it produces opinions?

Certainly there were changes over the 23 years. When I first came to the Court, for example, every Justice had two law clerks. By the time I left most Justices had four. I had three, Justice Rehnquist had three, Justice Stevens had two, but all the others had four. And, I think opinions tended to be longer at the time I left and perhaps more the product, at least preliminarily, of the law clerks than when I first came.

Like all federal courts, the workload of the Supreme Court has grown at a tremendous rate in the last two decades. Does the increased number of concurring and dissenting opinions reflect that workload pressures are making it more difficult for the Court to function as a collegial body?

Well, I hardly think so. Right from the time I first came here I was impressed with the fact that the Supreme Court of the United States had less collegiality and collective effort than the Court of Appeals on which I had served had had. There was no marked change in that over the years that I served. Perhaps, as a matter of fact, it became more collegial over that period of time. I think the number of separate opinions isn't significant in that respect.

Do you believe the increasing lack of unanimous opinions on sensitive social and political issues threaten in any way the public's confidence in the Court?

I hardly think so. It's always impressed me and rather surprised me how often the Court is unanimous. I think it's unanimous about a third of the time, and when you begin with a hypothesis that the cases that come to the Supreme Court of the United States are close cases, often involving issues about which other courts have differed—often novel issues—and if you begin with the hypothesis that the nine members of the Court have varying points of view, I think dissenting opinions and lack of unanimity are almost inevitable in almost every case. And, as I said at the outset, what has always impressed me was the number of times that the Court, given all of those things, is unanimous.

A few years ago, a law Professor said that, "Courts, through interpretation of the Constitution and the law, now reach into the lives of the people, against the will of the people, deeper than they ever have in American history." Do you agree with that statement? If so, do you see it as a "problem" that needs to be corrected, or is it perhaps an unavoidable evolution in the process of governing an increasingly complex society?

Well, I think, as the last part of your question implies, never before in our history has our social structure been so complex as it is now. Often courts have acted only after the political branches of government (legislative and executive)—state or federal—have failed to act or reached a political impasse. If a plaintiff brings a lawsuit in a court alleging that the conditions in a particular prison are unconstitutional, and if the court decides that the plaintiff is correct after hearing all the evidence, it is that court's duty to devise a remedial decree, and one can hardly criticize the courts for acting, particularly in the light of inaction by those who have the political responsibilities to run those institutions—prisons, schools, and so on.

With the exception of ceremonial occasions, cameras are currently forbidden in federal courts, but over 30 states now permit them. Do you think the federal policy is a sound one? Do you have any special feelings about televising arguments in the Supreme Court?

I think a good argument can be made against televising the proceedings in a trial court, the argument being that the televising of such proceedings would distort the administration of justice, would distort the actions of the witnesses and the members of the jury and even the judge, conscious as they would be that they were not just in a courtroom but in everybody's living room. I think a less forceful argument can be made along those lines when one talks about an appellate court, a reviewing court of any kind, and that would include the Supreme Court of the United States. However, it has been a long tradition that while the proceedings of the Supreme Court of the United States are open to the public including the written press and the television press, to report it in the newspapers or on television later, there are no transcriptions made for the benefit of the press and no televised transcriptions. I think that the day may come, if television is part of the press as it seems to be now and seems des-

See STEWART, p. 4

IRA'S: A CORRECTION

In the December *The Third Branch,* page 2, an article appeared entitled "Individual Retirement Accounts Now Available to All Judicial Branch Employees." That article described in the third full paragraph of the second column a limitation on IRA's: the investment of individual retirement accounts in collectibles. But the article stated that such investments are "now" allowable. That is incorrect. It should have read "the investment of individual retirement accounts in collectibles is *not* allowable." *The Third Branch* regrets the error.

STEWART from p. 3

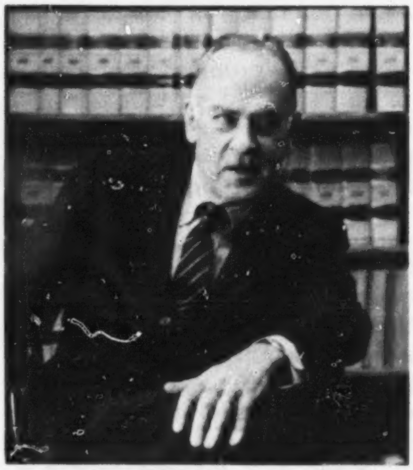
tined to be, that federal appellate proceedings will be televised. But, it seems to me that that day is pretty far in the future.

During your years on the Court you heard a lot of cases argued by a lot of lawyers. Do you share the criticism aimed at the quality of advocacy in the federal courts which came out of the Judicial Conference Committee which studied this subject?

Well, like everything human in this world, certainly the quality of appellate advocacy could be improved, and that as I say, is true of every human endeavor with which I am familiar. Every single one could be improved. And like most other things in life there is a wide disparity in the quality of appellate advocacy before the Supreme Court of the United States or before any appellate court. Some briefs and arguments are excellent, some are poor and most of them are somewhere in between. But it's been my observation, not only as a member of the Supreme Court of the United States, but earlier as a member of a Court of Appeals and earlier still as a practicing member of the bar, that the quality of the lawyers who appear before the courts with which I am familiar has been satisfactory.

Another area in which you have become renowned is that of free speech and free press. In light of several recent million-dollar libel judgments and the imprisonment of reporters who refused to divulge confidential sources, do you sense that the traditional protections given the press are being eroded? Do you perceive any cause for concern here?

No, I don't think that upsetting libel verdicts was a traditional protection of the press. After all, the libel law was well established at the time that the First Amendment was adopted. Nobody, until fairly recently, thought that the tort of libel had any connection with the First Amendment. And, indeed, this question of disclosure of confidential sources by newsmen is fairly recent. I think the case that we heard back some 25 years ago in the Court of Appeals for the Second Circuit (I was a member by designation)—the case of *Garland* v. *Torre*—was the very first case in which it had ever been claimed that a newsperson was protected in failing to disclose the confidential sources that he or she had by the First and Fourteenth Amendments. Up until then it had been considered purely a question of the evidence law of that particular jurisdiction. And so I think that when courts have sometimes rejected the First Amendment claims which are made in libel cases or in cases in which journalists have failed to disclose or refused to disclose their sources before a grand jury or elsewhere, that the courts are not rejecting traditional protections of the press but simply rejecting brand new claims by the press. So, I don't perceive any basic threat to the freedoms guaranteed by the First and Fourteenth Amendments. I dissented in some of those cases. Nonetheless, I think the thought that traditional protections are being ignored or disregarded or destroyed is a completely fallacious thought.



I wish I had had more time to write dissenting opinions.

You have an established record of writing major decisions in Fourth Amendment search and seizure cases. What are your views on proposals to modify the exclusionary rule? What do you think would be the practical impact of such a change?

The proposals that I have seen or that I am familiar with are those that would modify the exclusionary rule so as to permit the admissibility of evidence that was seized as a result of an innocent, good faith, technical violation of the Fourth and Fourteenth Amendments but not one that was seized as a result of a deliberate, knowing violation of the constitutional freedom from unreasonable search and seizure.

But one must remember that the exclusionary rule goes back to the year 1914. The case of *Weeks* v. *United States* was decided unanimously by a Supreme Court that has not been known in history as a militantly liberal court, and those were the days, of course, when the Fourth Amendment was thought to apply only to federal agents. It was only in *Mapp* v. *Ohio* that the Supreme Court of the United States held that the exclusionary rule was part of the Constitution, it having recently been held that the Fourth Amendment was part of the Fourteenth Amendment and that it required states to exclude evidence that had been seized in violation of the Fourth and Fourteenth Amendments. It is interesting to remember that the *Mapp* opinion was not a Court opinion. It was an opinion of four people who signed it and then there was a concurring opinion. Four people did not join it at all—did not join the result. But, in any event, it was not a Court opinion. I know a great deal of controversy has surrounded the exclusionary rule generally.

See STEWART, p. 6

Noteworthy

The United States Supreme Court has agreed to review the ruling made by Chief Judge Miles W. Lord (D. MN) that the Bankruptcy Reform Act's delegation of trial authority to bankruptcy judges is unconstitutional (See *The Third Branch,* June and October 1981). That ruling was based on Chief Judge Lord's finding that the Act's "wholesale" transfer of Article III powers exceeded the proper limits of delegation to non-Article III tribunals.

Two cases were consolidated for direct appeal from Judge Lord's decision. *Northern Pipeline Construction Co.* v. *The Marathon Pipeline Co.,* No. 81-150, and *U.S.* v. *The Marathon Pipeline Co.,* No. 81-546.

* * * * *

Contrary to expectations, the Department of Justice on January 5 filed separate appeals on behalf of the President to the Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit in the salary litigation of *Foley* v. *Reagan.* The appeal to the Supreme Court, filed under 28 U.S.C. §1252, objected to Chief Judge John Lewis Smith's (D. D.C.) order of November 16, 1981, which held, *inter alia,* that recently increased salaries of senior non-Article III judicial branch personnel could not retroactively be reduced (see *The Third Branch,* December 1981) as well as his order of December 7 denying the Government's request for a "Munsingwear order" dismissing the case against the President. The appeal to the D.C. Circuit was from the same rulings, "except the parts of those orders in which the Court held unconstitutional the Act of October 12, 1981 [which imposed the salary reductions]."

* * * * *

An Administrative Law Judge of the Architectural and Transportation Barriers Compliance Board ruled last month that the federal courthouse in Atlanta does not violate the Architectural Barriers Act in having judges' benches, witness stands, jury boxes and court reporters' stations reachable only by steps. The Executive Director of the Compliance Board had alleged that these places are not sufficiently accessible to and usable by physically handicapped persons.

Administrative Law Judge Thomas I. Megan held that the Barriers Act is inapplicable to these courtroom sites because they constitute personal property (architect-designed furniture) rather than realty and because they are located in private working spaces and not the public area of the courthouse (which is accessible to the handicapped).

In dicta, Judge Megan also observed, as three federal judges had testified, that neither the place nor the position in the courtroom from which wheelchair witnesses testified adversely affected the quality of their testimony nor in any way impaired the administration of justice.

Under the Barriers Act, this holding is deemed a final order of the Board itself. *In re Compliance Federal Courthouse, Atlanta, Georgia,* Citation No. 6-80-8 (Architectural and Transportation Barriers Compliance Board, Dec. 18, 1981).

* * * * *

In a report issued late last year, the Research Advisory Committee of the Second Circuit Court of Appeals concluded that the Court's Civil Appeals Management Plan (CAMP) is "clearly effective in promoting settlements and reducing the proportion of appeals that require argument and determination by the court." The CAMP program was instituted in 1975 under the leadership of then Chief Judge Irving R. Kaufman with the goal of conserving judge time. Court-employed lawyers work with the parties to determine if their case can be settled voluntarily and without judicial involvement. CAMP also expedites preparation of cases on appeal and helps to focus and narrow the issues for cases that are submitted to argument.

The Advisory Committee, chaired by Columbia Law School Professor Maurice Rosenberg, received technical assistance in its work from the Federal Judicial Center. Later this year, the Center will publish a somewhat broader analysis of the CAMP program. Although the Center report's conclusions parallel those of the Advisory Committee report, it also includes various statistical analyses and treats some questions not addressed in the shorter Advisory Committee Report.

Copies of the Advisory Committee Report are available from the Office of the Second Circuit Executive, U.S. Courthouse 1803, Foley Square, New York, NY 10007; (212) 791-0978 or (FTS) 662-0978, or from the Center's Information Service.

* * * * *

ABA's Judicial Administration Division has constituted a Committee on Courts and the Community aimed at advising judges what they can do to refute misconceptions about courts. The Committee, made up of both state and federal judges, has developed ideas which judges might consider for inclusion in their speeches to public groups or articles they might write on the courts and the judicial process generally. For further information contact Committee Chairman Eugene Murret, 109 Supreme Court Bldg., 301 Loyola Ave., New Orleans, LA 70112.

* * * * *

The Judicial Conference of the United States adopted at its September 1981 meeting the requirement that, effective January 1, 1983, 8½ X 11-inch paper "will be the only acceptable size in all federal courts." The Archivist of the

See NOTEWORTHY, p. 8

STEWART from p. 4

The criticism is best perhaps summed up in Justice Cardozo's aphorism that "the constable blundered so the criminal goes free." But those who support it say that it is the only effectively available way to enforce the provisions of the Fourth and Fourteenth Amendments, and to date that has been the view espoused by the Supreme Court of the United States. What its future may be, I don't know, but it seems to me that if one modifies the exclusionary rule and moves to this sort of good faith inquiry that other difficulties will arise which, foreseeably, will be just as difficult issues as are present now. What law enforcement officer is ever going to say that he deliberately and knowingly violated the Fourth and Fourteenth Amendments? So the test will have to be how egregious was the violation, and that in the end becomes something of a subjective test.

Repeatedly, you have advocated restriction on the use of federal habeas corpus and collateral review of state criminal convictions. What do you feel would be a more appropriate role for the federal judiciary in this area?

There is a built-in, inherent conflict between the state and federal court systems. It is unnecessarily exacerbated, it seems to me, if, for example, a person has been convicted in a state criminal court, the conviction has been affirmed on review by an intermediate appellate court, and by the state's supreme court—with many judges having reviewed the claimed errors—and then one federal district judge grants a writ of habeas corpus to review the state's entire court system. I wouldn't favor entirely abolishing the power, but I think it has been exercised, perhaps irresponsibly, and perhaps too freely in many areas, by single individual district judges and by federal courts of appeals and ultimately by the Supreme Court. In a way it implies a criticism of an entire state system: that the judges who people that system—trial and appellate—are not capable and not to be trusted in deciding federal constitutional claims, which I think is a fallacious idea, an insult.

What are your opinions on the constitutionality and the propriety of proposed legislation which would remove federal court jurisdiction in cases involving abortion, busing, prayers in school? What factors really are the impetus for these proposals?

My opinions on the constitutionality of such proposals are academic, now that I am retired. But I would point out that there might be a different answer, depending upon whether or not you are talking about stripping the Supreme Court of the United States of jurisdiction, or other federal courts, because the Supreme Court is itself created by the Constitution and the Constitution does no more than authorize Congress to create the other federal courts. So there might be differing constitutional answers.

As to the policy of such proposals—and speaking now only as a citizen, not as a former judge—it seems to me that any such moves would greatly disturb the established balance in our country and in our society that has been established now since the days of Chief Justice Marshall and accepted, whether you like a particular decision or don't.

Among proposals aimed at easing the Court's workload are calls to create a National Court of Appeals to resolve intercircuit conflicts. What are your opinions of this idea?

Well, the proposals that I have seen so far I would be opposed to for two basic reasons. First of all, none of the proposals that I have seen so far would, in my opinion, really ease the load of the Supreme Court of the United States and, secondly, I think they would rob the Supreme Court of a very precious quality that it possesses, and that is its quality of accessibility to everybody. A Gideon can be in a prison cell in Florida and write a half legible letter in scrawl to the Supreme Court of the United States and know that his message is going to come to every Justice's chambers and that it will be decided on its merits by the Supreme Court of the United States. I would hate to see a system that would say to a Gideon or anyone else, "Sorry, Mister, your case is a second-class case; it can't come to the Supreme Court of the United States." Those are the two reasons. First of all, I don't think that the proposals I have seen would serve the purpose of easing the burden of the Supreme Court of the United States. And, secondly, if one provided that some cases could never come to the Supreme Court or could come only after overcoming some obstacles that would eliminate what seems to me very precious qualities of the Supreme Court, which are its accessibility, its simplicity, and the fact that here we do our own work.

See STEWART, p. 9

CA-3 SEEKS ASSISTANT TO THE CIRCUIT EXECUTIVE AND JUDICIAL COUNCIL

Responsibilities: Under the Circuit Executive and Judicial Council, the assistant is responsible for a broad range of tasks in all phases of court administration (See 28 U.S.C. 332(e)). The Third Circuit includes the federal courts in Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

Qualifications: (1) law degree or advanced degree in management or a related field; (2) one year progressively responsible experience in the functional area of the work to be performed, e.g., court administration, social science evaluation, information systems, or legal research. One year of specialized experience — $23,566; two years, $28,245; or three years, $33,586.

Salary: $23,566 - $33,586 (JSP 11-13) commensurate with qualifications.

To Apply: Send two copies of resume to Paul Nejelski, Third Circuit Executive, 20716 U.S. Courthouse, Philadelphia, Pennsylvania 19106, prior to March 1, 1982.

EQUAL OPPORTUNITY EMPLOYER

CENTER RELEASES FOUR NEW PUBLICATIONS

Copies of these reports are available from the Center's Information Service Office, 1520 H Street, N.W. Washington, D.C. 20005. Enclosing a gummed, self-addressed label (which need not be franked) will expedite shipment. Or, you may call the Office at (202) 633-6365 (also FTS).

APPEALS EXPEDITING SYSTEMS

Appeals Expediting Systems: An Evaluation of the Second and Eighth Circuit Procedures, by Professor Larry C. Farmer of the J. Reuben Clark Law School at Brigham Young University, and prepared under contract to the Center, addresses the problem of delay in the appellate process by detailing and comparing the efforts of two circuit courts to reduce the time required to prepare cases, both civil and criminal, for submission on appeal. The report also discusses the potential applicability of computerized management systems to appeals expediting procedures.

The Center began its research in the area of appeals expediting systems when the Judicial Council of the Eighth Circuit asked it to document and analyze the system that the court had installed to expedite criminal appeals (soon expanded to civil appeals) by close monitoring of each appeal by clerk's office personnel. The Center subsequently undertook a somewhat similar effort at the request of the Tenth Circuit Judicial Council, and that work is nearing completion. The Second Circuit, however, had an appeals expediting system in place, one for criminal appeals and another for civil appeals (part of its Civil Appeals Management Plan). The instant report analyzes its operation and compares it with that of the system in the Eighth Circuit.

The Second Circuit's Civil

See EXPEDITING, p. 9

OPINION PUBLICATION

"An Evaluation of Limited Publication in the United States Courts of Appeals — The Price of Reform" reports the results of research undertaken on contract with the Center and published in *The University of Chicago Law Review.*

The authors — Professors William L Reynolds and William M. Richman of the Maryland and Toledo University law schools, respectively — analyzed the circuits' opinion-publication rules and their published and unpublished appellate opinions during the 1978-79 reporting year. They evaluate the costs and benefits of the nonpublication rules by assessing the quality of unpublished opinions, and decisions not to publish opinions, according to criteria that they explain in the article. Although their somewhat critical assessment of non-publication rules may be subject to debate, the authors do provide the first systemwide empirical analysis of these rules. They also propose, based on their analysis, a model rule for publication, designed to realize the benefits of limited publication which avoid some of its hazards.

COURTRAN

"Courtran" refers to a range of computer-based systems for federal court and case management that the Federal Judicial Center has developed over the course of its twelve-year history. These systems, how the Center developed them, and the underlying question of technology's role in the courts are treated in "Using Technology to Improve the Administration of Justice in the Federal Courts," by Charles W. Nihan and Russell R. Wheeler, of the Center.

See COURTRAN, p. 9

SANCTIONS

Sanctions Imposable for Violations of the Federal Rules of Civil Procedure, by Professors Robert E. Rodes, Jr., Kenneth F. Ripple, and Carol Mooney, of the University of Notre Dame School of Law, and written for the Center, surveys the current state of the law with respect to sanctions for violations of the Federal Rules of Civil Procedure as reported in both the case law and the secondary literature.

The report discusses the relevant procedural rules concerning sanctions, and their interrelation, the constitutional limitations on the imposition of sanctions, and considers such questions as the possibilities of imposing sanctions on the attorney rather than the client.

Much of the study's focus is on the litigation behavior that has resulted in the imposition of sanctions. In addition, the report analyzes federal judicial opinions to determine the factors that the judges appear to consider important in determining which sanctions to apply. The typical pattern of sanctioning, the authors conclude, is "one in which the delay, obfuscation, contumacy, and lame

See SANCTIONS, p. 9

GPO PRICE CHANGE IN *EXPERIMENTATION IN THE LAW* REPORT

The November 1981 *The Third Branch* announced publication of *Experimentation in the Law,* the report of the Center's Advisory Committee of that name, and indicated that the report is for sale by the Government Printing Office. GPO has raised the price of the report from $4.25, as indicated in the article, to $4.75. When ordering, please reference GPO stock #027-000-01148-9.

Legislative Update

COURT OF APPEALS FOR THE FEDERAL CIRCUIT APPROVED BY SENATE; BANKRUPTCY BILLS INTRODUCED; OTHER ACTION

On November 18, the House passed H.R. 4482 merging the Court of Claims and the Court of Customs and Patent Appeals into the Court of Appeals for the Federal Circuit. (See *The Third Branch*, December 1981.) On December 8, the Senate passed a similar bill, S. 1700, titled the Federal Courts Improvement Act of 1981. The Senate then passed H.R. 4482, amended to contain the language of the Senate bill. But the Senate had approved an amendment to S. 1700 relating to bankruptcies of farm produce storage facilities that was not in the House bill.

The concurrence of the House was requested in S. 1700 and H.R. 4482 as passed by the Senate.

Bankruptcy. Congressman Rodino has introduced H.R. 5107 to improve retirement benefits to bankruptcy judges. A bill with a similar objective, the Bankruptcy Judges Retirement Act of 1981 (S. 1788) was previously introduced in the Senate by Senator DeConcini.

Senator Dole has introduced S. 2000, the Bankruptcy Improvements Act of 1981. Among other things, the bill provides for a threshold eligibility test for relief under Chapter 7 based on the petitioner's ability to pay a reasonable portion of his debts out of future income. The bill also establishes a repayment standard in Chapter 13 cases based on the debtor's ability to repay out of future income. Similar legislation has been proposed in the House.

Bail. The Senate Judiciary Committee has approved a bill amending the Bail Reform Act of 1966 to permit a court to consider a defendant's "danger to the community" when deciding whether to impose pretrial detention or set bail. A similar bill (H.R. 4264) is pending in a House Judiciary subcommittee.

Voting Rights. A bill to extend the Voting Rights Act of 1965, which is identical to the bill passed in the House in October (H.R. 3112), has been introduced in the Senate. The bill, S. 1992, has been placed on the Senate calendar.

SUPPORT AVAILABLE TO ATTEND COLUMBIA LEGAL EDUCATION PROGRAM THIS SUMMER

District and circuit judges who wish Center support to attend Columbia Law School's two-week Program of Professional Development for Lawyers should so indicate by letter, as soon as possible, to the Director of the Center. The program, now in its second year, will run from June 7 to June 18, 1982.

As with the Harvard Summer Program of Instruction for Lawyers (see *The Third Branch*, November 1981), Columbia has agreed to waive tuition for federal judges, and the Center will be able to provide travel and per diem for a limited number.

The program, which involves a large number of the Columbia faculty, includes one- and two-week courses in a broad range of continuing legal education subjects.

U.S. CIRCUIT JUDGES INVITED TO APPLY FOR U.VA. LAW SCHOOL GRADUATE PROGRAM

The University of Virginia Law School is now receiving applications for the second class in its recently inaugurated Graduate Program for Judges. The class will enroll on July 1, 1982. The program involves attendance at six-week resident sessions at the Law School in Charlottesville for two successive summers. The program leads to the award of the degree of Master of Laws in the Judicial Process.

The program is specially designed for appellate judges of both federal and state courts. Program funds are sufficient to cover all expenses of each judge attending, including travel, lodging, meals, tuition, and all instructional materials. The curriculum is designed to provide more substantial, in-depth study of material that is interdisciplinary, comparative, and jurisprudential than is available in any other program of judicial education.

Circuit judges who are interested in the program may obtain full information by calling or writing the Director of the program, Professor Daniel J. Meador, University of Virginia Law School, Charlottesville, Virginia 22901. Telephone (804) 924-3947. Deadline for applications is February 25, 1982.

NOTEWORTHY from p. 5

United States originally requested consideration of this action and the Court Administration Committee recommended that action. The Administrative Office of the United States Courts conducted a poll of clerks of the federal courts for their views on prohibiting legal-size paper. Forty percent of the clerks, according to the poll, favored eliminating legal-size paper. Forty percent opposed and twenty percent had no opinion.

During the transition period, from December 14, 1981, to December 31, 1982, both 8½ x 14-inch and 8½ x 11-inch paper will be acceptable unless local rules prohibit the use of 8½ x 14-inch paper. There will be no requirement that both sides of the paper be used.

STEWART from p. 6

What is the answer then?

The answer is to appoint Justices who are competent and who are willing to work, and I think the work is doable. This doesn't mean that I'm not very happy that all this attention has been given to the problem because I think it's a problem that may be a continuing one and may be an increasing one. I think now the work is doable, but I think anybody would agree that if the number of certiorari petitions went up to 500,000 a year, that the point would be reached where the work would not be doable. There is some point at which everybody would agree. Now there are about 5,000 or a little less.

On a personal level, what do you feel was the most significant case in your judicial career? Similarly, do you have any regrets about anything you did or did not do or say in connection with the opinions of the Court?

Well, I can't say what was my most important case in my career because I think it's important for a judge—any judge—to remember that every case is the most important case in the world to the litigants in that case. And a judge shouldn't think of cases as his cases but rather as their cases. And every case is, as I say, the most important case in the world to the people involved in that case and that's something of which a judge should never lose sight.

Yes, I'm not completely happy with everything I did. For one thing, I wish I had had more time to write dissenting opinions. Perhaps I wrote more than my share as it was. But, sometimes just the efficient use of time prevented doing that, and I therefore would join other people's dissenting opinions even though they were written not exactly the way I would have written them. And, if one remembers that, as I said at the beginning that the cases here are close cases, one perhaps has lingering doubts about the correctness of what he decided. But I have no permanent doubts about anything that I did on the merits, and I think it is very, very important that a member of the Supreme Court or any judge do the very best job he can and then move on to the next case and not stay awake all night worrying and wondering whether he did right.

Are you going to sit on the lower courts?

Yes, I have already committed myself to sit in the Court of Appeals for the Sixth Circuit and in the Court of Appeals for the Seventh Circuit. Both of those are after the first of the year.

I have had very tempting invitations from several law schools to go to their campuses which I may well accept and I'm going to be engaged in an international arbitration in a controversy that can't possibly reach any American court, which will be interesting, too. I am also recording for the blind two hours a week. It's made me appreciate all the services of the thousands if not millions of men and women who give freely of their time in the service of their fellow men and women.

EXPEDITING from p. 7

Appeals Management Plan (CAMP) was instituted in 1974, with initial financial help from the Center, on the initiative of then Chief Judge Irving R. Kaufman.

The Second and Eighth Circuit Courts of Appeals' median disposition time statistics compare quite favorably with the other circuits. The data in this report are not sufficient to attribute their strong performance to the courts' expediting systems, but it is true that both have generally been successful in exerting early control of the presubmission process. The Center report compares the specific expediting procedures in each court and suggests the advantages and disadvantages of each court's approach.

COURTRAN from p. 7

The article is part of a "Symposium on Judicial Administration" published in the *Brigham Young University Law Review,* Vol. 1981, No. 3. The symposium treats an array of topics, including the role of the Chief Justice, discovery abuse, complex litigation, federal court review of state court decisions, and recent legislative actions to split the old Fifth Circuit Court of Appeals, and to reform federal judicial councils. A limited number of issues of the entire symposium are available (only to federal judicial personnel, however) from the Information Service.

SANCTIONS from p. 7

excuses on the part of litigants and their attorneys are tolerated without any measured remedial action until the court is provoked beyond endurance." At that point, the court punishes one side or the other with a swift and final termination of the lawsuit by dismissal or default. The authors make specific recommendations on how to counter this "all or nothing" approach to sanctions and propose several amendments to the rules.

PRISONS from p. 2

hind bars it has "an obligation - a moral obligation - to do whatever can reasonably be done to change that person before he or she is released back into the stream of society." The Chief Justice also noted improvements made in some prisons and, particularly, in the federal prison system. Further improvements may not completely erase recidivism, the Chief Justice indicated, but improvements should be made.

PERSONNEL

NOMINATIONS

Michael S. Kanne, U.S. District Judge, N.D. IN, Dec. 4
James T. Moody, U.S. District Judge, N.D. IN, Dec. 4
David L. Russell, U.S. District Judge, N.D., E.D. & W.D. OK, Dec. 4
Robert H. Bork, U.S. Circuit Judge, CA-DC, Dec. 7
Harold L. Ryan, U.S. District Judge, D. ID, Dec. 7

CONFIRMATIONS

Alvin I. Krenzler, U.S. District Judge, N.D. OH, Dec. 9
Ralph K. Winter, Jr., U.S. Circuit Judge, CA-2, Dec. 9
Israel L. Glaser, U.S. District Judge, E.D. NY, Dec. 9
J. Owen Forrester, U.S. District Judge, N.D. GA, Dec. 9
Sam A. Crow, U.S. District Judge, D. KS, Dec. 9
David L. Russell, U.S. District Judge, N.D., E.D., & W.D. OK, Dec. 16
Harold L. Ryan, U.S. District Judge, D. ID, Dec. 16

APPOINTMENTS

Cynthia H. Hall, U.S. District Judge, C.D. CA, Nov. 20
Richard A. Posner, U.S. Circuit Judge, CA-7, Dec. 4
Clarence A. Beam, U.S. District Judge, D. NE, Jan. 8

ELEVATION

Sam C. Pointer, Jr., Chief Judge, N.D. AL, Jan. 1

RESIGNATION

Frank H. McFadden, Chief Judge, N.D. AL, Jan. 1

SENIOR STATUS

Oliver Gasch, U.S. District Judge, D. DC, Nov. 30
Edward J. Boyle, Sr., U.S. District Judge, E.D. LA, Dec. 1

DEATHS

William J. Lindberg, U.S. District Judge, W.D. WA, Dec. 15
Robert A. Ainsworth, U.S. Circuit Judge, CA-5, Dec. 22

ao & fjc calendar

Jan. 20-22 Judicial Conference Committee on Judicial Ethics
Jan. 20-22 Workshop for Judges of the Eighth and Tenth Circuits
Jan. 21-22 Judicial Conference Advisory Committee on Codes of Conduct
Jan. 25-26 Judicial Conference Committee on Court Administration
Jan. 25-26 Judicial Conference Committee on the Judicial Branch
Jan. 25-27 Judicial Conference Committee on Administration of the Probation System
Jan. 26-27 Judicial Conference Committee on Operation of the Criminal Law
Jan. 27-28 Judicial Conference Committee on the Budget
Jan. 27-29 Workshop for Judges of the Ninth Circuit
Jan. 27-30 Judicial Conference Committee to Implement the Criminal Justice Act
Jan. 28-29 Judicial Conference Committee on Administration of the Magistrate System
Jan. 28-29 Judicial Conference Committee on Operation of the Jury System
Jan. 28-29 Judicial Conference Committee on Rules of Practice and Procedure
Feb. 5 Judicial Conference Committee on Administration of the Bankruptcy System
Feb. 5-6 Judicial Conference Ad Hoc Committee on Disposition of Court Records
Feb. 8-10 Judicial Conference Committee on Admission of Attorneys to Federal Practice
Feb. 11-12 Judicial Conference Advisory Committee on Bankruptcy Rules

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FEBRUARY 1982

CHIEF JUSTICE BURGER CALLS ON BAR TO PURSUE ALTERNATIVES TO LITIGATION

In his Annual Report on the State of the Judiciary, Chief Justice Warren E. Burger, pointing to the alarming escalation of civil cases reaching the courts in recent decades, called on members of the bar to make greater efforts to resolve disputes through alternative dispute-solving mechanisms.

Addressing the American Bar Association at its midyear meeting in Chicago on January 24, the Chief Justice reminded the gathering of the recommendations which emerged from the Pound Conference in 1976 including his own call for "a reappraisal of the value of the arbitration process." He commended the work of the Association's Special Committee on Alternative Means of Dispute Resolution, but said more needs to be done. The Chief Justice asked that the Association alter its existing committee and its scope, or establish an enlarged commission to include representatives of business and other disciplines. This group, he pointed out, should proceed with an in-depth examination of all problems related to attempts to avoid litigation whenever possible. "Prime candidates" for areas in which alternatives to litigation are most feasible, he said, are divorce, child custody, adoptions, personal injury, landlord-tenant cases, and probate of estates.

From 1940 to 1981, the Chief Justice said, federal civil cases increased from about 35,000 to 180,000, nearly doubling the caseload per judgeship from 190 to 350 cases per year. And, from 1950 to 1981, the annual filings in the courts of appeals climbed from over 2,800 to more than 26,000, increasing the annual caseload per judgeship from 44 to 200. He pointed out that a parallel trend also took place in state courts from 1967 to 1976. Additionally, an increasing number of cases in the courts go on for months, years, and even a decade or longer. They consume vast amounts of judge time as well as the time of supporting personnel, and cost, overall, hundreds of millions of dollars.

"If the courts are to retain public confidence," he said, we cannot let disputes wait two, three, or five years to be disposed of.... The use of private binding arbitration has been neglected. We need to consider moving some cases from the adversary system to administrative processes, like workmen's compensation, or mediation, conciliation, and especially arbitration."

Arbitration procedures must be carefully designed, Burger cautioned, and not merely another step in what is already a prolonged process. "If a system of voluntary arbitration is to be truly effective, it should be final and binding, without a provision for *de novo* trial or review.... Anything less than final and binding arbitration should be accompanied by some sanctions to discourage further conflict."

Also singled out for criticism were the law schools. Law schools, he said, should train future lawyers in methods of dispute-solving that would keep their clients away from the courts. Emphasizing this point, the Chief Justice offered the opinions of two distinguished figures: "Abraham Lincoln once said: 'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.' In the same vein, Judge Learned Hand commented: 'I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.' "

PRESIDENT TO FORM CABINET LEGAL AFFAIRS COUNCIL

President Reagan plans to add a cabinet council on legal affairs to five existing councils, set up last February to coordinate administration policy on complex issues. The new council will be chaired by Attorney General William French Smith. As a policymaking mechanism, it is expected to deal with interdepartmental aspects of narcotics control, drug abuse prevention and treatment, civil rights, immigration and refugee policy, and other similar legal issues which transcend the jurisdiction of the Department of Justice.

The original five councils are on economic affairs, commerce and trade, food and agriculture, natural resources and environment, and human resources.

JU 10. 3/2:

IMPROVING PROSPECTS FOR EMPLOYMENT OF EX-OFFENDERS

Two mechanisms to improve the long-term employment outlook for parolees, and thus reduce recidivism, are evaluated in separate papers in the current issue (December 1981) of *Federal Probation*. Statistics reported in a study by James L. Beck (U.S. Bureau of Prisons) confirm earlier studies that show employment problems among a substantial number of federal parolees, but indicate that release from incarceration through a Community Treatment Center, or halfway house, significantly improves opportunity for some. Those most positively affected by CTC release are minority offenders. CTC releasees worked more days and earned more money, on the average, than parolees not released through a halfway house. Beck also found that, although CTC placement did not improve recidivism rates among white offenders, minority parolees released through CTCs showed a significantly lower recidivism rate.

In the second paper, Mark R. Weideranders (California Youth Authority) confirms a finding by others that, while a preponderance of young ex-offenders find jobs within a few months of release, keeping those jobs is very difficult for many of them. Standard vocational training programs in correctional institutions, "employability" programs which stress job-searching and job interviews, and "job survival skill" programs now offered in many institutions are not teaching young offenders what they need to know to keep their jobs, Weideranders suggests. Job-finding and resume-writing skills, the researcher says, are probably irrelevant for these offenders, who often find jobs informally through friends and family. Few institutions include job survival techniques in their curricula, he points out, and, because of a lack of materials for teaching job maintenance skills, current job survival programs are not adequate to the task of preparing these young people to get along with or tolerate co-workers and supervisors, "how to hang on to an unexciting job long enough for promotions or better opportunities. . . to present themselves, how to use informal peer networks for support or to air gripes, and how to get on-the-job or part-time training for better employment when motivation for it develops."

AMERICAN BAR ASSOCIATION MIDYEAR MEETING HELD IN CHICAGO

Two issues which drew high attention at the ABA midyear meeting last month involved the proposed new Model Rules of Professional Conduct and a resolution presented to the House of Delegates urging it to rescind its August 1981 action to revise Standard 211 of the Association's Standards for Approval of Law Schools.

The Model Rules of Professional Conduct, which have been in draft form for months, were before the House for a decision on format. By a clear majority, the delegates elected to state the rules in a format similar to the American Law Institute's restatements and modern codes.

Standard 211 permits the law schools to consider religion when selecting both students and employees. ABA President David R. Brink stated last year after the ABA made a change in Standard 211, "The American Bar Association on numerous occasions has adopted policies disapproving all forms of discrimination in public institutions. However, that principle cannot be applied with equal force to a private religious institution that is exercising its constitutional right to freedom of religion." Prior to the ABA change in its Standard 211, a case was brought against the Association by the Oral Roberts University because of the Association's denial of accreditation. U.S. District Judge James B. Moran (N.D. IL) held for the university and ruled that the ABA's denial of accreditation impermissibly impinged upon the school's free exercise of religion and its rights under the First Amendment.

The House voted against rescinding the action taken last August.

The House of Delegates also took the following actions: approved a model grand jury act; approved a special judicial retirement system for bankruptcy judges; urged Congress to increase compensation amounts authorized under the Criminal Justice Act of 1964; supported legislative proposals to amend the Freedom of Information Act to provide more protection for financial, commercial, and business information; and supported a proposal to enact legislation which would, among other things, delegate rulemaking authority to the Judicial Conference of the United States. Also included in the rulemaking resolutions was a proposal which calls upon the Judicial Conference to promote openness in the rulemaking process.

Complete text of the recommendations considered by the House of Delegates is available in the FJC's Information Service Office.

TheThirdBranch

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Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

JUDGES URGED TO SPEAK OUT ON ISSUES AFFECTING JUDICIAL SYSTEM

Judges have a responsibility "to educate the public and the other branches of government...on matters that affect the judicial system, because the public interest cannot be served by silence," writes Chief Judge Emeritus Irving R. Kaufman (CA-2) in the *New York Times,* January 30, 1982. It is an error to think judges should not speak out on issues relating to the administration of justice, according to Kaufman. Indeed, he adds, "judges should play the role of lions in the policymaking process, rather than lambs who withdraw to the safety and isolation of their chambers." Moreover, Canon 4 of the ABA Code of Judicial Conduct "encourages judges to speak, write, teach, and participate in activities looking to improve the legal system and the administration of justice."

Judge Kaufman's recent article reiterates some of the opinions expressed in his "Congress v. The Court," a lengthy essay which appeared in the *New York Times Magazine,* September 30, 1981. That article dealt with the thirty-odd bills now pending in Congress which would curtail the authority of the federal judiciary and limit its power of judicial review.

In remarks delivered elsewhere, former television executive and journalism professor Fred W. Friendly also exhorted members of the judiciary to abandon their traditional silence and voice their concerns on matters of importance. At the least, Friendly urges, judges must perceive a duty to educate those who directly educate the public. For their part, the news media have an obligation to keep the public informed about ongoing "attempts to eviscerate the power of the [federal] judiciary," but the media are standing "idly by because," with a few exceptions, "they don't understand the issues," Friendly explained. Judges and members of the bar, he argued, ought to make themselves available to the media and the public, and even "take an editor or publisher or television producer to lunch—'Dutch treat,' " to explain the ramifications of recent political moves to alter the system. Friendly's comments were in an address to a joint meeting of the American Judicature Society and the National Council of Bar Presidents in Chicago on January 23, 1982.

1982 Circuit Judicial Conferences

CA-1	October 18, 19, 20	Williamstown, Mass.
CA-2	Sept. 9, 10, 11, 12	Hershey, Pa.
CA-3	Sept. 7, 8, 9, 10	Philadelphia, Pa.
CA-4	July 1, 2, 3	White Sulphur Springs, W. Va.
CA-5	May 2, 3, 4, 5	San Antonio, Texas
CA-6	July 15, 16, 17, 18	Asheville, N.C.
CA-7	May 17, 18	Milwaukee, Wisc.
CA-8	July 25, 26, 27, 28	Minneapolis, Minn.
CA-9	July 27, 28, 29, 30, 31	San Diego, Calif.
CA-10	July 7, 8, 9, 10	Snowbird, Utah
CA-11	May 2, 3, 4, 5	Kissimmee, Fla.
CA-DC	May 9, 10, 11, 12	Hot Springs, Va.

DAVIS BECOMES CA-9 CIRCUIT EXECUTIVE

William E. Davis was sworn in January 11, 1982, as Circuit Executive for the Ninth Circuit. Davis, 39, had been serving as Assistant Circuit Executive since July 1981. He moves into the position formerly occupied by William B. Luck.

After being graduated in 1964 from Transylvania University with an A.B. in business administration, Davis began a seven-year career with the Peace Corps, starting as a volunteer in rural Chile. He then moved into that organization's training staff, and left in 1971 after serving as program officer and acting deputy director of the Peace Corps program in Chile.

Davis returned to Lexington, Kentucky, in 1971 to complete work toward his J.D. at the University of Kentucky College of Law. While in law school, he was director of a Legal Aid Society program.

Since 1973 Davis has occupied various judicial administration posts, working from 1973 to 1975 in the Administrative Office of the California Courts, and from 1975 to 1979 was Kentucky's State Court Administrator.

From 1979 to 1981, Davis was personnel officer for the Bahā'ī World Centre in Israel.

For his organizational and managerial accomplishments and his innovations in the Kentucky court system, Davis received numerous awards from Kentucky legal and judicial organizations. During that time, in addition, Kentucky's Pre-Trial Release Program was recognized by the Council of State Governments as one of the ten best new state government programs of the year.

ADMINISTRATIVE CONFERENCE OF U.S. REAFFIRMS POSITION ON BUMPERS AMENDMENT

At its December 11, 1981, meeting, the Administrative Conference of the United States reaffirmed its 1979 opposition to the so-called Bumpers Amendment which seeks to revise the standard of review of administrative agency actions by the federal courts (§706 of the Administrative Procedure Act [APA]). In 1979 the Conference expressed the belief that congressional concern about "the broad substantive reach of the rules of a host of agencies cannot be effectively addressed by legislation prescribing new across-the-board standards for review." Currently two bills are pending in the Senate and one in the House relating to this issue.

After considerable discussion, the Conference reaffirmed its opposition to legislation altering the weight that reviewing courts should afford agency statutory interpretation or expertise. However, the Conference also agreed that should Congress feel it necessary to enact legislation in this area, it should redraft pending bills to reflect the following amendment to Section 706 of the APA: "In determining whether an agency action in adopting a rule in a proceeding subject to Section 553 [the rulemaking procedure] of this title is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court shall consider whether there is substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of the rule."

SECOND CIRCUIT RELEASES 1981 REPORT

Courts of the Second Circuit saw "extraordinary" caseload increases in 1981, according to the sixth annual report of the United States Courts for the Second Circuit. The 94-page document, prepared by the circuit executive pursuant to statute, compiles and interprets circuit and comparative statistics, and also reports on judicial administration programs and developments in 1981.

Bankruptcy filings, terminations, and pending cases all sharply increased in 1981, and civil and bankruptcy appeals "skyrocketed" in the circuit. Of all categories, only criminal appeals decreased.

Long-standing judicial vacancies seriously affected the circuit in 1981. Four vacancies out of eleven judgeships were vacant as of September 1981, and there were numerous district vacancies as well.

During 1981 magistrate activity increased in almost every area in the district courts of the circuit, with the most dramatic increase recorded in the number of consensual civil cases terminated: 153 in 1981 compared to 29 in 1980.

The court of appeals, through its Revised Plan to Expedite the Processing of Criminal Appeals, reduced the median disposition time of criminal appeals by an additional two months, from 4.6 months in 1980 to 4.4 months in 1981. The report also describes the recent evaluation of the circuit's Civil Appeals Management Plan.

One significant improvement in caseload statistics, not reflected in the report, is that the Southern District of New York, which once had one-third of all three-year-old civil cases in the U.S., now has less than four percent of such cases. This, according to Circuit Executive Steven Flanders, is due to "aggressive case management by the district's twenty-seven judges."

THE SOURCE

The Information Service of the Federal Judicial Center

The following are recent publications of interest to those in the federal court system. They are listed for information purposes, and only those entries appearing in bold are available from the Federal Judicial Center.

Appellate Practice in the United States. Robert L. Stern. Bureau of National Affairs (1981).

Delay in the Courts. Speech before the Atlanta Chapter, Federal Bar Association, Robert H. Hall. December 11, 1981.

Effective Judicial Management of Motion Practice. Edward J. Devitt. 91 F.R.D. 153 (1981).

Federal Appellate Advocacy in the 1980's. Albert Tate, Jr. 5 American Journal of Trial Advocacy 63 (1981).

More Warehouses, or Factories With Fences? Speech before Lincoln Bar Association. University of Nebraska. Warren E. Burger. December 16, 1981.

No Access to Law: Alternatives to the American Judicial System. Edited by Laura Nader. Academic Press (1980).

Remarks of Chief Judge Wilfred Feinberg to New York County Lawyers Association. New York, NY. December 10, 1981.

Should Juries Be Required in Civil Actions? A Chalienge to the Seventh Amendment. Lecture at Southern Methodist University. Edward J. Devitt. November 11, 1981.

Some Reflections on the Nature and Future of the Adversary System. A. Sherman Christensen. 30 Defense Law Journal 325 (1981).

Survey of State Mandatory Ju-

See SOURCE, p. 5

SOURCE from p. 4

dicial Education Requirements. Julie N. Brownstein. Criminal Courts Technical Assistance Project. American University Law Institute. March 1981.

Symposium on Judicial Administration. 1981 Brigham Young University Law Review 443 (1981).

Using Technology to Improve the Administration of Justice in the Federal Courts. Charles W. Nihan and Russell R. Wheeler. 1981 Brigham Young University Law Review 659 (1981).

Symposium on Women in the Judiciary. 65 *Judicature* No. 6. (December-January 1982).

The Improvement of the Administration of Justice, 6th ed. Edited by Fannie Klein. ABA Judicial Administration Division (1981).

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Charles W. Nihan, Deputy Director
Russell R. Wheeler, Assistant Director

Noteworthy

Activist judges "arrogate to themselves functions reserved to the legislative branch or the states" and thus exceed "their constitutionally limited role," says Attorney General William French Smith. The Department of Justice will continue to urge the judiciary to exercise judicial restraint, and will encourage the selection of federal judges who espouse self-restraint on the bench. It will also adhere to this policy in its litigation. Justice Department lawyers, asserts Smith, will "not advance arguments [before courts] that promote judicial activism even when those arguments might help us in a particular case." Smith's remarks appear in an article in the current (January 1982) issue of the *American Bar Association Journal.*

* * * * *

Judge Dudley Baldwin Bonsal of the United States District Court for the Southern District of New York has been designated by the Chief Justice to serve on the United States Foreign Intelligence Surveillance Court for a term to end on May 18, 1984.

Judge Bonsal will succeed Judge Lawrence W. Pierce of the United States Court of Appeals for the Second Circuit, whose term on the Surveillance Court was to expire May 18, 1984. Judge Pierce was formerly a United States District Judge for the Southern District of New York and, by statute, could not serve on the Surveillance Court after his elevation to the Court of Appeals.

The Court was created by the Foreign Intelligence Surveillance Act of 1978 and consists of seven United States District Court judges designated by the Chief Justice. The presiding judge of the court is Senior Judge George L. Hart of the District of Columbia. The Foreign Intelligence Surveillance Court of Review (three judges from the district or circuit courts) hears cases appealed from decisions of the Foreign Intelligence Surveillance Court.

* * * * *

As reported in *The Third Branch* (August 1981), the ruling by U.S. District Judge Joseph H. Young (D. MD) that the Speedy Trial Act is unconstitutional has been appealed to the Fourth Circuit. At oral argument on December 10, however, the U.S. Attorney, at the direction of the Justice Department, reversed the position he had taken before the trial court and asserted that the Speedy Trial Act *was* constitutional. Since both parties sought to reverse the opinion of the district court, oral argument centered not on the substantive issue but on whether or not a case or controversy existed. To resolve this problem, counsel suggested that *amicus curiae* be appointed to argue the position that the act is unconstitutional. As *The Third Branch* goes to publication, however, no action has been taken on this suggestion, and no ruling on the merits has been issued by the Fourth Circuit.

* * * * *

A personal experience prompted Judge John M. Shaw (W.D. LA) to suggest that a reminder be published relating to Blue Cross coverage. Policyholders should keep in mind that children who reach the age of 22, or those over 22, are not eligible for coverage under the family health benefits enrollment. There is only one exception and that is if the child, already covered, reaches 22 and is incapable of self-support because of physical or mental incapacity which existed before the age of 22.

PERSONNEL

NOMINATIONS

Eugene F. Lynch, U.S. District Judge, N.D. CA, Jan. 25
Leroy J. Contie, Jr., U.S. Circuit Judge, CA-6, Jan. 26
Elizabeth A. Kovachevich, U.S. District Judge, M.D. FL, Jan. 26
Robert B. Krupansky, U.S. Circuit Judge, CA-6, Jan. 28

APPOINTMENTS

David V. O'Brien, U.S. District Judge, D. VI, Dec. 4
Jesse E. Eschbach, U.S. Circuit Judge, CA-7, Dec. 11
John H. Moore, II, U.S. District Judge, M.D. FL, Dec. 15
James C. Cacheris, U.S. District Judge, E.D. VA, Dec. 18
Sam A. Crow, U.S. District Judge, D. KS, Dec. 23
Alvin I. Krenzler, U.S. District Judge, N.D. OH, Dec. 24
Israel L. Glasser, U.S. District Judge, E.D. NY, Dec. 28
Harold L. Ryan, U.S. District Judge, D. ID, Dec. 30
Robert G. Doumar, U.S. District Judge, E.D. VA, Jan. 4
J. Owen Forrester, U.S. District Judge, N.D. GA, Jan. 4
Ralph K. Winter, Jr., U.S. Circuit Judge, CA-2, Jan. 5
Clyde H. Hamilton, U.S. District Judge, D. SC, Jan. 8
Jackson L. Kiser, U.S. District Judge, W.D. VA, Jan. 12
David L. Russell, U.S. District Judge, N.D., E.D., W.D. OK, Jan. 12
John C. Shabaz, U.S. District Judge, W.D. WI, Jan. 19
Edward R. Becker, U.S. Circuit Judge, CA-3, Jan. 22

ELEVATION

Allen Sharp, Chief Judge, U.S. District Court, N.D. IN, Dec. 11

M.D. FLORIDA SEEKS COURT CLERK

Responsibilities: High-level management position functioning under the direction of the Chief Judge of the Court. The Clerk of Court is responsible for managing the administrative activities of the Clerk's Office and overseeing the performance of the statutory duties of that office. 28 U.S.C. §751. The Middle District includes courts at Jacksonville, Orlando, and Tampa. 28 U.S.C. §89 (b).

Qualifications: Minimum of ten years of progressively responsible administrative experience in public service or business which provides a thorough understanding of organizational, procedural, and human aspects in managing an organization. Education equivalents of undergraduate, post-graduate or legal training may be substituted for required general experience.

Salary: $39,689 - $54,755 (JSP-14-16) commensurate with qualifications.

To Apply: Send three copies of resume to Chief Judge, P.O. Box 3209, Tampa, FL 33601 prior to April 1, 1982.

EQUAL OPPORTUNITY EMPLOYER

SENIOR STATUS

Paul C. Weick, U.S. Circuit Judge, CA-6, Dec. 31
William B. Bryant, U.S. District Judge, D. DC, Jan. 31

DEATH

Newell Edenfield, U.S. District Judge, N.D. GA, Dec. 26

ao co fjc calendar

Mar. 10-12 Video Orientation for Newly Appointed Bankruptcy Judges
Mar. 11-12 Judicial Conference of the United States
Mar. 15-17 Workshop for Procurement Clerks
Mar. 17-19 Seminar for Bankruptcy Judges
Mar. 22-24 Workshop for Deputy Clerks of Bankruptcy Courts
Mar. 29-31 Workshop for Training Coordinators
Mar. 31-Apr. 2 Advanced Seminar for Full-Time Magistrates
Apr. 5-7 Workshop for Judges of the Fourth Circuit
Apr. 14-16 Workshop for Judges of the D.C. and First Circuits
Apr. 21-23 Seminar for Bankruptcy Judges

THE THIRD BRANCH
VOL. 14 NO. 2 FEBRUARY 1982
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THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005
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UNITED STATES COURTS

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14/3

The Third Branch

Bulletin of the Federal Courts

VOL. 14, NO. 3

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MARCH 1982

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DEPOSITORY 376

JUDICIAL APPROPRIATIONS HEARINGS HELD

On February 24, Representative Neal Smith of Iowa, chairman of the House Appropriations Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies, opened the subcommittee's hearings on the federal judiciary's budget requests for fiscal year 1983, which commences on October 1, 1982.

The appropriations requests for all federal judicial agencies total $843,133,000, an increase of $109,128,000 over the fiscal 1982 spending level. The entire third branch of government thus constitutes—as it has for many years—about one-tenth of one percent of the total federal budget authority sought from the Congress, which is approximately $802 billion for fiscal 1983.

Chief Judge Charles Clark of the Fifth Circuit Court of Appeals, accompanied by Administrative Office Director William E. Foley, testified on behalf of the circuit, district, and bankruptcy courts' request for a fiscal 1983 appropriation of $777,600,000, an increase of $98,980,000 over the courts' approved spending level for fiscal 1982.

Judge Clark is Chairman of the Budget Committee of the Judicial Conference, which, he said, shares the Appropriations Committee's "concern for the country's current economic troubles and commitment to fiscal restraint in the face of projected deficits. The increases we must seek," he told the subcommittee, "reflect no more than the cost of maintaining the current level of service."

Judge Clark noted that over half of the increased appropriations request was due to the rising costs of goods and services that the courts need to perform their work. Without these rises due to inflation and to other financial factors beyond the courts' control, the judiciary's increased budgetary requirements would be $46,224,000 (about 6.8 percent) over its 1982 level.

Impact of new filings

The non-inflationary increases sought for fiscal 1982 are also due primarily to factors beyond the courts' control—increases in filings at all levels, which Judge Clark documented for the subcommittee. The impact of these new filings is seen most directly in the request for 40 additional deputy clerks in the circuit courts, 415 in the district courts, and 176 in the bankruptcy courts. In all, 1,015 new positions were requested, including 219 for the probation system and 165 other positions not related to filing increases. Were Congress to approve the new positions requested by all third branch agencies in their appropriations requests, staffing in the judiciary would total 15,945 positions.

See APPROPRIATIONS, p. 2

PRO BONO PANEL FOR PRO SE LITIGANTS

The Eastern District of New York this month becomes the first federal district court to develop and set in motion a Pro Bono Litigation Panel for the assignment of volunteer attorneys to *pro se* civil litigants. So far, more than three hundred attorneys have volunteered their services to the panel, following a request to join the program by Chief Judge Jack B. Weinstein to over 20,000 attorneys in July 1981.

Because of recent cutbacks in federal funding for legal services and changes in various entitlement programs, the number of indigent civil litigants is expected to rise above the already large number of

See PRO BONO, p. 3.

SEMINAR FOR NEWLY APPOINTED DISTRICT JUDGES SCHEDULED

FJC Director A. Leo Levin and Kenneth C. Crawford, director of the Center's Continuing Education and Training Division, have announced the dates for the next seminar for newly appointed United States District Court Judges: May 24-29.

All sessions, and a reception for new judges on May 23, will be held at the Center's headquarters in the Dolley Madison House in Washington.

Ju 10. 3/2:

APPROPRIATIONS from p. 1

Direct costs for the new positions in the circuit, district, and bankruptcy courts will total almost $21,000,000. Over $13,000,000 will be needed for additional office space costs, and over $4,000,000 for additional operational and maintenance costs associated with these new positions.

An increase of over $4,600,000 was requested for defender services, much of it, he said, "associated with the impact of inflation on the program." An additional $4,500,000 was requested to cover projected increases in the use of grand and petit jurors in 1983; Judge Clark summarized the efforts the courts had expended to date and that they anticipate expending for improved juror utilization, an item of special interest to the subcommittee.

Inflationary adjustments

"Much of the increase in budgetary requirements," Judge Clark told the subcommittee, "is due to rising costs of goods and services." An additional $10,644,000, for example, was requested to cover inflationary increases in travel costs, telephone services, postage fees, law books, and other costs.

Judge Clark expressed special concern over the rental of office and other space from the General Services Administration (GSA). Because GSA controls the courthouses and third branch office space, as it does other government facilities, the courts must ask Congress for appropriations with which to pay GSA for their use. For fiscal 1983, GSA has imposed rental increases that Judge Clark described as "extraordinary," especially because the increases "come at a time when the General Services Administration is reducing building services throughout the system." Most especially, he noted, "there continues to be a growing concern over the inadequacy of the security currently provided to the federal judiciary."

The judiciary's formal budget justification document noted that almost $20,000,000 of the increased rental costs for the circuit, district, and bankruptcy courts is "to cover an anticipated increase of 19.5 percent in" GSA user charges. "In effect," the justification stated, "the Judiciary will pay GSA $120,034,000 in fiscal year 1983 for the same space which will cost $100,485,000 in fiscal year 1982." Some of the rental increases imposed on other third branch agencies are of a much greater proportional magnitude. An increase of over 90 percent, for example, is being imposed on the two government buildings that serve as the headquarters for the Federal Judicial Center.

Federal budget process

Funds for the third branch are not requested in a lump sum. Rather, the budgets for the Supreme Court, the three national courts (Claims, Customs and Patent Appeals, and International Trade), the Administrative Office, and the Federal Judicial Center—in addition to those for the circuit, district, and bankruptcy courts—are each developed and presented separately.

The largest segment of the judicial budget is for the courts of appeals, district, and bankruptcy courts, which are broken out into a series of eight appropriations—for example, "Salaries of Judges," "Salaries of Supporting Personnel," and "Fees of Jurors and Commissioners."

These budget requests have been under development for almost a year. The annual budget call in April 1981 to the chief circuit and district judges, and to the clerks of the bankruptcy courts, asked for projected personnel needs in fiscal 1983 in those courts, and the probation service, as well as for estimated requirements for their other support services. After analysis in the Administrative Office's program divisions and Budget Branch, the revised figures were reviewed by the Judicial Conference's Budget Committee and program committees (e.g., on court administration, magistrates, bankruptcy, the probation system, etc.). After further analysis the Budget Committee transmitted these recommended fiscal 1983 budgets to the Judicial Conference last summer, which approved the budget at its September 1981 meeting.

The budget requests for the third branch were transmitted last fall to the Office of Management and Budget for insertion into the President's overall budget. By statute, the Office of Management and Budget may not change the judiciary's budget submissions, as it may those of executive branch agencies.

Hearings before the House Subcommittee will continue in March to review requests of the Supreme Court and the national courts. Hearings on all the judicial budget requests will be held before the corresponding Senate Appropriations Subcommittee in mid-April.

LAW DAY

May 1 will once again be celebrated as Law Day. The first Law Day, U.S.A., was proclaimed by President Dwight Eisenhower in 1958. Law Day XXV has been given the theme, "A Generation of Progress."

The Third Branch

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Co-editors:

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

PRO BONO from p. 1

unrepresented parties in civil actions. In 1980, six hundred of a total of 3,350 civil cases in the Eastern District, or over sixteen percent of the total, were filed by *pro se* litigants. In 1981, *pro se* litigants represented over fifteen percent of the total in the district.

Three areas of law in which civil actions are most often brought *pro se,* and in which *pro bono* attorneys can be expected to provide counsel, are appeals from the denial of social security disability benefits, employment discrimination cases, and civil rights suits. A Social Security Seminar, the first of a projected series of training seminars for interested attorneys, was held March 6. The proceedings were recorded and will be made available later, at least in part.

To support the program and to reimburse volunteer attorneys for out-of-pocket litigation expenses resulting from Pro Bono Panel cases, the Eastern District Civil Litigation Fund, Inc., is being formed. The nonprofit corporation will seek foundation grants and private donations for funds to carry out the program. Its board of directors consists of the deans of area law schools and local bar association presidents or representatives.

The function of the corporation in providing financial resources for the program is, in part, a response to the appeal by the Federal Judicial Center Committee on Prisoner Civil Rights, chaired by Judge Ruggero J. Aldisert, in *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* (FJC Report, January 1980). The report asked for solutions to the problem of compensating counsel in civil rights litigation. In addition, the training function of the program responds to the King Committee suggestion that federal courts become involved in continuing legal education.

Noteworthy

The salary litigation of *Foley* v. *Reagan* has been concluded. Late last month, all parties agreed to withdraw appeals that had recently been filed in both the D.C. Court of Appeals and the Supreme Court (see *The Third Branch,* January 1982). This leaves intact the November 16, 1981, order of Chief Judge John Lewis Smith (D. DC), which disposed of all remaining issues in the case pertaining to non-Article III judicial personnel.

* * * * *

Persons incarcerated in state and federal penal institutions numbered 357,043 as of September 30, 1981, reports the Bureau of Justice Statistics. This figure is 8,000 greater than the total number of prisoners confined in the previous quarter of the year, but the increase represents growth in the population of state prisoners—since the number of federal prisoners remained virtually unchanged between quarters. In addition, the overall increase in prisoner population, which is 2.1 percent, is slightly lower than increases reported in the previous two quarters of 1981. (The total prisoner population is now about the same as that of the Shreveport, Louisiana, metropolitan area.)

* * * * *

A list of free and inexpensive materials for use in law-related education projects constitutes part of the Winter 1982 issue of *LRE Report.* Published by the ABA's Youth Education for Citizenship, the report is available by subscription or by single copy (each free) for the asking from YEFC, 1155 East 60th Street, Chicago, IL 60637. Or, by phone requests to (312) 947-3960.

THE SOURCE

The Information Service of the Federal Judicial Center

The following publications have recently been received by the Center's Information Service, and may be of interest to ***The Third Branch*** *readers. Only those appearing in boldface print are available for distribution from the Center. Requests for these items should be made in writing, and will be expedited if the writer includes a self-addressed, gummed mailing label, franked or unfranked. Write the Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, D.C. 20005.*

Changes in Prison and Parole Policies: How Should the Judge Respond? Anthony Partridge. Federal Probation Quarterly, June 1981.

Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century. David S. Clark. 55 Southern California Law Review 65 (1981).

Facing the Crisis of Court Costs and Delay. Leonard S. Janofsky. 7 Bar Leader 22 (Jan.-Feb. 1982).

Foundations of Power: John Marshall, 1801-15. George Lee Haskins. New York, Macmillan, 1981.

Louis D. Brandeis and the Progressive Tradition. Melvin I. Urofsky. Little, Brown & Co., 1981.

Science and Law: A Dialogue on Understanding. Howard T. Markey. 68 A.B.A.J. 154 (Feb. 1982).

The Enigma of Felix Frankfurter. H. N. Hirsch. Basic Books, Inc., 1981.

The Brandeis-Frankfurter Connection. Bruce A. Murphy. Oxford University Press, 1982.

PERSONNEL

NOMINATIONS

John R. Gibson, U.S. Circuit Judge, CA-8, Feb. 2

Harold M. Fong, U.S. District Judge, D. HI, Feb. 11

John L. Coffey, U.S. Circuit Judge, CA-7, Feb. 19

William W. Caldwell, U.S. District Judge, M.D. PA, Feb. 19

Glenn E. Mencer, U.S. District Judge, W.D. PA, Feb. 19

Carol Los Mansmann, U.S. District Judge, W.D. PA, Feb. 23

CONFIRMATIONS

Michael S. Kanne, U.S. District Judge, N.D. IN, Feb. 8

James T. Moody, U.S. District Judge, N.D. IN, Feb. 8

Robert H. Bork, U.S. Circuit Judge, CA-DC, Feb. 8

ELEVATIONS

Luther B. Eubanks, Chief Judge, W.D. OK, Jan. 12

Howard B. Turrentine, Chief Judge, S.D. CA, Mar. 26

SENIOR STATUS

Frederick A. Daugherty, U.S. District Judge, N.D., E.D., W.D. OK, Jan. 12

Edward J. Schwartz, U.S. District Judge, S.D. CA, Mar. 26

DEATH

Robert L. Kunzig, Judge, U.S. Ct. of Claims, Feb. 21

FEDERAL PUBLIC DEFENDER VACANCY, DISTRICT OF HAWAII

The Federal Public Defender will maintain an office in Honolulu, Hawaii, and will be authorized to appoint a full-time staff including one Assistant Federal Public Defender, one investigator, and one secretary.

The office will operate under the authority of 18 U.S.C. §3006A (h) (2)(A) and the District's Criminal Justice Act Plan.

Candidates for the position of Federal Public Defender should have five years of trial experience, and be admitted to the Bar of the highest court of any state or territory or federal district court.

Applications will be received until March 31, 1982, and should be directed to: Chief Judge Samuel P. King, United States District Court, P.O. Box 50128, Honolulu, Hawaii 96850.

Equal Opportunity Employer

D. D.C. SEEKS CHIEF PROBATION OFFICER

Position: Chief Probation Officer, U.S. District Court for the District of Columbia. The officer is responsible, in accordance with the applicable provisions of 18 U.S.C. §§3654-3655 and chapter 207 of Title 18, to the district court, the Judicial Conference of the United States, the Administrative Office of the United States Courts and the United States Parole Commission for the probation, pretrial services, and parole programs in the judicial district. Salary $39,689 to $57,500.

Qualifications: For JSP-14: Four-year degree in one or more of the social sciences appropriate to the position to be filled. Advanced degree preferred. Four years of current experience in personnel work for the welfare of others with at least one of those years at the level of a supervising probation officer or chief probation officer, JSP-13, or the equivalent. For JSP-15: one year of experience as a deputy chief probation officer, JSP-14, or the equivalent. For JSP-16: one year of experience as a chief probation officer, JSP-15, or the equivalent.

To Apply: Employees within the Federal Probation System should send a resume, others an SF-171, to Judge Aubrey E. Robinson, Jr., United States Courthouse, 3rd and Constitution Ave., N.W., Washington, DC 20001. Starting date is July 1, 1982. Position closes May 15, 1982.

Equal Opportunity Employer

ao fjc calendar

Mar. 11-12 Judicial Conference of the United States

Mar. 15-17 Workshop for Procurement Clerks

Mar. 17-19 Seminar for Bankruptcy Judges

Mar. 18-19 Conference of Metropolitan District Chief Judges

Mar. 22-24 Workshop for Deputy Clerks of Bankruptcy Courts

Mar. 31-Apr. 2 Advanced Seminar for Full-time Magistrates

Apr. 5-7 Workshop for Judges of the Fourth Circuit

Apr. 14-16 Workshop for Judges of the D.C. and First Circuits

Apr. 21-23 Seminar for Bankruptcy Judges

Apr. 26-27 Sentencing Institute (Eighth and Tenth Circuits)

Apr. 28-30 Workshop for Judges of the Third Circuit

1981 INDEX FOR THE THIRD BRANCH DISTRIBUTED

A complete index to articles in Volume 13 of *The Third Branch* has now been mailed. Each article published during 1981 is listed and cross-indexed under appropriate subject-headings.

THE THIRD BRANCH
VOL. 14, NO. 3 MARCH 1982
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14/4

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APRIL 1982

APR 24 98

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JUDICIAL CONFERENCE ACTS ON FINANCIAL DISCLOSURE, OTHER ISSUES

Responding to some judicial spouses' reluctance to reveal the worth of their independent assets on financial disclosure forms for judicial officers and upper-grade employees, the Judicial Conference of the United States at its March 11-12 meeting decided to recommend that Congress eliminate the requirement that the specific value of spouses' and dependent children's assets be reported. While the type and payment origin of each income source over $1,000 of spouse *and* children would continue to be included on the disclosure form, future reporting will probably be facilitated by the Conference's adoption of more specific reporting instructions. These changes, which require amendments to the Ethics in Government Act, were included in recommendations of the Conference's Committee on Judicial Ethics.

In other actions affecting judicial families, the Conference adopted the resolutions of the Committee on the Judicial Branch regarding its support of legislation intended to improve judicial survivors' benefits, H.R. 4763 and S. 1874. The bills would increase the minimum survivor's annuity to thirty percent of average salary over the last three years and the maximum annuity would increase to fifty percent (S. 1874) or fifty-five percent (H.R.

See CONFERENCE, p. 6

Thirteenth circuit court; chief judges' tenure; other changes

FEDERAL COURTS IMPROVEMENT ACT SIGNED

On April 2, President Reagan signed the "Federal Courts Improvement Act of 1982," now Public Law 97-164, which will take effect October 1, 1982.

The bulk of the 34-page act consolidates the Court of Claims and Court of Customs and Patent Appeals into a thirteenth circuit court, the 12-judge United States Court of Appeals for the Federal Circuit, and a 16-judge, Article I United States Claims Court. It also makes technical and conforming amendments pursuant to that change.

The act also serves as a vessel for numerous important administrative and housekeeping changes, unrelated to the creation of the new courts. Many of the changes—such as a limitation on chief judges' tenure and a new basis for calculating interest on money judgments—have been on the legislative agenda for at least several years.

—**New Federal Courts**. The new circuit court inherits all the appellate jurisdiction of the two existing courts, and in addition, patent appeals from all federal district courts. Thus, it will hear appeals in suits against the government for damages or refunds of federal taxes, appeals from the Court of International Trade, appeals from the Patent and Trade-

See COURTS ACT, p. 4

SHIFTING OF MARSHALS' DUTIES PROPOSED

In a joint statement issued March 11, 1982, Chief Justice Warren E. Burger and Attorney General William French Smith announced a series of actions designed to assure adequate security services "to all the participants in the federal judicial system, most especially the Judiciary itself." They characterized their actions, not as a final solution, but as a "useful beginning" to resolve the dilemma caused by increasing security needs in a time of increasing fiscal austerity.

- Primary responsibility for security services to the judiciary will be in the hands of the U.S. Marshals Service (USMS) in general, and in each United States Marshal in each district. In order to halt the current fragmentation in services caused by the division of authority among the USMS, the GSA, and the Postal Service, the Attorney General "is seeking an appropriate delegation of authority" from the GSA Administrator. "The judiciary in each district will, therefore, have a single individual to whom it can look for all judicial security matters." The Attorney General also will try to obtain additional funding for court security, so that security resources will be equivalent to FY 1979 levels.
- To ease the burden on U.S. Marshals, the Chief Justice, as he indicated in the joint statement, recommended that the Judicial Conference approve the proposed amendments to Rule 4 (c) and (d) of the Federal Rules of Civil Pro-

See SECURITY, p. 3

Ju 10.3/2:

CASELOAD INCREASES IN FEDERAL COURTS

As anticipated, the workload of the federal courts increased markedly in calendar year 1981 over 1980, A. O. Director William E. Foley told the Judicial Conference of the United States in his report to its March meeting.

Civil case filings in the district courts totaled 190,430, a rise of 9.2 percent above the number filed in the previous year. Cases filed in U.S. Courts of Appeals last year also reached a record level of 27,445, 13.8 percent over the 1980 total.

Even criminal cases, which had experienced a downward trend in recent years, increased by 5.7 percent. Offense categories showing significant increases are prosecutions for: murder, up 17.7 percent; robbery, up 9 percent; embezzlement, up 11.8 percent; weapons and firearms violations, up 39.9 percent; marihuana violations, up 39.7 percent; Agricultural Act violations, up 88.8 percent.

While cases involving the U.S. rose modestly in 1981, by 5.3 percent (cases filed by the U.S. rose 7.7 percent, and cases against the U.S. increased by 1.4 percent), appeals of civil cases involving the U.S. rose 20.4 percent, the largest category of increase on the appellate level. Courts of appeals also registered dramatic increases in the number of bankruptcy and private civil appeals, up 19.6 and 17.3 percent, respectively.

The district courts terminated 5.7 percent more civil cases than in 1980; nevertheless, the rise in filings led to an increase in the pending civil caseload of 5.1 percent. This total included an increase in diversity cases of 12.3 percent and in cases involving federal questions of 11.1 percent. Significant increases are noted in actions for recovery of overpayments and enforcement of judgments (most regarding student loans and overpayments of veterans' educational benefits), which jumped 48.6 percent from 1980 to 1981. Other categories registering large increases included prisoner civil rights and habeas corpus petitions, tax suits, and employment civil rights cases. Subcategories showing statistical declines were land condemnation cases, fraud cases (including truth-in-lending), environmental matters, and Freedom of Information Act cases.

The well-publicized volume of bankruptcy estate filings rose 10.9 percent from 1980 to 1981. A record 523,825 filings were made, 363,847 having been filed after implementation of the Bankruptcy Reform Act. Although bankruptcy courts closed 64.3 percent more estates in 1981 than in 1980, the increase in filings results in a backlog of 685,330 estates. Adversary proceedings arising from bankruptcy cases also significantly contribute to a pending caseload: there were 63.8 percent more such actions, 115,894 more, in 1981 than in 1980.

PRISONER CIVIL RIGHTS PROCEDURES

Following the recommendation of its Committee on Court Administration, the full Judicial Conference at its recent meeting formally recognized the significance of the final report of the Federal Judicial Center Committee on Prisoner Civil Rights, chaired by Judge Ruggero J. Aldisert, and urged district courts to implement the procedures and forms suggested in the report.

The report, *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts,* was published early in 1980. It had been released in two draft stages to allow the benefit of comment from attorneys and judges familiar with prisoner civil rights cases. In May 1980, the Chief Justice dismissed the committee with his appreciation for its contribution.

Pro Bono Panels Revisited. . .

Dear Editor:

I note in Volume 14, No. 3, of *The Third Branch* the article stating that "The Eastern District of New York this month becomes the first federal district court to develop and set in motion the pro bono litigation panel for the assignment of volunteer attorneys to pro se litigants." This statement is an egregious and unfortunate error.

The Eastern District of Pennsylvania has had a volunteer panel of pro bono attorneys since March 1977. We presently have twenty-eight law firms which designate different associates to handle the cases. No provision is made to pay them and to my knowledge they are purely pro bono in that none has asked for payment. Indeed, the attorneys do not even ask for reimbursement of expenses, looking upon these as contributions to the public good.

The panel has been of great help to the court. Although it has worked quietly and without fanfare, as you can well recognize, it seems unfortunate they are deprived of the recognition of being the first in the United States by a good five years to marshal forces and to meeting this troublesome problem. I feel that the panel's erroneous statement in *The Third Branch* should in some manner be corrected.

Joseph S. Lord, III
Chief Judge (E.D. PA)

EDITOR'S NOTE: WAS THE EASTERN DISTRICT OF PENNSYLVANIA THE FIRST?

The Third Branch

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

SECURITY, from p. 1

cedure, relieving marshals of responsibility to serve private civil process. (The Conference did approve the changes. See box.)

- The Chief Justice plans also to "encourage the adoption of local rules" to relieve U.S. Marshals of responsibility for serving private process "by the use of alternative methods of serving process. The Attorney General will continue to seek legislation to facilitate the development of such alternative methods, to compensate the government fully for process served, and to reduce the statutory obligation to serve most private civil process. As resources are saved by this action, they may, if appropriate, be reallocated to the court security function on the basis of the experience we gain in implementing the recommendations of the Court Security Task Force."

The Judicial Conference at its spring meeting approved amendments to Rule 4 of the Federal Rules of Civil Procedure. The most significant revisions follow.

Subdivision (a) of Rule 4 currently provides for a marshal or another authorized person to serve the summons and complaint to a defendant. The proposed revision provides that the court clerk deliver a summons to the plaintiff or his attorney, who will have responsibility for arranging service. Revised subdivision (c) authorizes service by any non-party individual who is at least 18 years of age, or at the request of a party, by the U.S. Marshal or by another person as the court may order. Marshals will also continue to provide service for indigent litigants and seamen.

A revised subdivision (d) of Rule 4 will allow, alternatively, for service of the summons and complaint by registered or certified mail, with return receipt requested. This subdivision of the proposed rule describes the procedure for using the mails, and does not preempt existing statutory requirements for personal service, including service on behalf of the U.S. pursuant to 28 U.S.C. §569(b). And, the Advisory Committee on the Rules of Civil Procedure adds, "[F]orms of process which require an enforcement presence, such as temporary restraining orders, injunctions, attachments, arrests, and orders relating to judicial sales, shall be served by marshals, their deputies, and persons specifically appointed by the court."

The procedure for mail service, the Advisory Committee notes, is "to be the basis for the entry of defaults and default judgments when actual notice reasonably can be expected to have occurred. Thus, if the defendant or person authorized to accept process for him either has signed the return receipt or has refused to accept the process, a default could be entered." If process is refused by the intended addressee, even that act would constitute good service. However, by the terms of the proposed rule, "the person serving the process, promptly upon the receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit." If, however, the defendant can demonstrate to the court that service was refused by an unauthorized person, any such default will be set aside.

Under the rulemaking procedures, the Conference's recommended changes go to the Supreme Court. If the Court approves the changes, they go then to the Congress, and absent congressional action, would take effect ninety days after submission.

FBI IN DRUG INVESTIGATIONS

The Federal Bureau of Investigation now has jurisdiction over the investigation of drug and related offenses, following an action by Attorney General William French Smith on January 21, 1982, designed to bring the FBI's wide resources to bear in the "fight against the most serious crime problem facing our nation—drug trafficking." FBI Director William H. Webster has been assigned responsibility for general supervision of drug enforcement efforts, and the Drug Enforcement Administration will now report to the Department of Justice through the FBI Director.

Under the new structure announced by Smith, the DEA, with additional personnel, will now be able to employ such sophisticated law enforcement techniques as court-authorized electronic surveillance.

Smith also stressed the capability of the unified effort to pursue other violations uncovered in drug investigations, such as "organized criminal activities, money laundering, bank fraud, and public corruption."

NEW CENTER PUBLICATION

The Center has recently published *Administrative Structures in Large District Courts,* by Philip Dubois. The report, undertaken at the request of the Conference of Metropolitan District Chief Judges, describes how the 15 federal district courts with 10 or more judgeships provide for the performance of administrative tasks, including the division of responsibility between the chief judge and other judges, and among the judges and support personnel.

Copies of the report should be requested in writing from the Center's Information Service Office. Please enclose a self-addressed gummed mailing label; a franked label is preferable but not essential.

COURTS ACT, from p. 1

mark Office, and a few other agency review cases. The court will have jurisdiction over federal contract appeals in which the United States is a defendant, and all appeals from the Merit Systems Protection Board (including cases over which the Court of Claims did not have jurisdiction). Review of the new court's decisions will be by *certiorari* to the Supreme Court.

The seven judges of the Court of Claims and the five judges of the Court of Customs and Patent Appeals will become the judges of the new court. The act creates no new judgeships. It specifies that the chief judge of the new court will be the chief judge with the longer service on either of the two existing courts. (CCPA Chief Judge Howard T. Markey took office in 1972, Court of Claims Chief Judge Daniel Friedman in 1978.)

The new Article I Claims Court will inherit all the Court of Claims' trial jurisdiction except for Federal Tort Claims Act cases—only one of which has ever been filed in the Court of Claims. These cases will continue to go to the district courts and regional circuit courts.

—Tenure of Chief Judges. The act limits circuit and district chief judges' tenure to seven years (plus whatever period is necessary for a successor to qualify), and provides that a judge over the age of 64 may not become chief judge. Other judges may "act as chief judge" should no one on the court meet the statute's requirements. As currently provided, no one may serve as chief judge after reaching 70 years of age unless no other judge is qualified to serve (or act) as chief judge.

The act will not apply to chief judges serving on October 1, 1982, the effective date of the act.

—Court of Appeals Panels and En Bancs. A majority on three-judge circuit court "panels" (a word change from the current "divisions") must be judges of that court unless recusal, disqualification, or emergency precludes it. Further, the newly created circuit court may sit in panels of more than three.

Also, active circuit judges gain precedence over other judges in any session of the court, and the role of senior circuit judges on *en bancs* is specified: senior circuit judges assigned to duty pursuant to statute and court rules may sit on *en bancs* reviewing decisions of panels of which they were members. Consistent with a provision of the 1978 Omnibus Judgeship Act, the act specifically authorizes *en bancs* of less than all judges for courts with fifteen or more active judges.

—Court of Appeals Rules. The act directs each court of appeals to publish its local rules and internal operating procedures, allowing free distribution to members of the bar and to "other interested parties." Each court is to appoint an advisory committee on the court's rules of practice and internal operating procedures.

—Appellate Court Staff. The act specifically authorizes each circuit court to appoint a senior

See COURTS ACT, p. 5

OPINIONS SEEKING RULES CHANGES INVITED

The Federal Courts Improvement Act of 1982 adds section 1631 to Title 28. It authorizes transfer of a civil action or an appeal, if, after notice or filing, the court "finds that there is a want of jurisdiction." Transfer shall be to another court in which the action or appeal could have been brought at the time it was filed or noticed.

This provision stems from a concurring opinion of the late Judge Harold Leventhal in *Investment Company Institute* v. *Board of Governors, Federal Reserve System,* 551 F.2d 1270 (D.C. Cir. 1977). In *Investment Co.,* a panel of the D.C. Circuit affirmed a district court judgment dismissing the case for lack of subject matter jurisdiction, and, noting the jurisdictional ambiguities facing the plaintiff, suggested that counsel "file petitions in both courts, or at least in the court of appeals, if there is any doubt as to the appropriate forum for judicial review."

Concurring, Judge Leventhal called for "the enactment of a general statute permitting transfer between district courts and courts of appeals in the interest of justice, excluding specifically but not exclusively those instances when complaints are filed in what later proves to be the 'wrong' court."

Judge Leventhal's opinion was brought to the attention of Chairman Robert Kastenmeier of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice. A round of correspondence led to proposed legislation in March 1978, and further correspondence led to the perfected provision in the current act. (The correspondence can be found in the Hearings of May 1978 on "Judicial Housekeeping" before Congressman Kastenmeier's subcommittee.)

Spurred in part by this incident, the Federal Judicial Center several years ago offered to serve as a clearinghouse to which judges might send judicial opinions in which they note defects or gaps in statutes and rules similar to that noticed by Judge Leventhal. As a clearinghouse, the Center does not take an advocacy position on such suggestions, but can channel them to the appropriate Judicial Conference committee, including advisory rules committees, or, if appropriate, to a congressional committee.

The invitation is still open. Opinions should be sent to the Director of the Center.

COURTS ACT, from p. 4

staff attorney, as well as a librarian and a court crier, each of whom, with the approval of the court, may appoint staff attorneys, assistant librarians, and messengers.

—Post-Judgment Interest. The act changes the basis for calculating interest on money judgments (except for Internal Revenue tax cases). Interest will be allowed, not at the rate set by state law, but, rather, based on the average accepted price for the last auction of 52-week U.S. Treasury bills settled immediately prior to the date of judgment. The Administrative Office is charged with the responsibility of keeping federal judges notified of that rate.

—Court Reporting. The Judicial Conference is to conduct experiments with electronic and alternative recording methods, during which time 28 U.S.C. §753(b) remains in effect. Section 753(b) requires shorthand or mechanical recording concurrently with the other methods. The Conference is to promulgate regulations, effective sometime after September 1983, to allow use of electronic and other methods without the pre-existing requirements.

—Other provisions. The act also provides for transfer of a case for want of jurisdiction (see box), allows a judge who resigns to accept an executive branch appointment to credit his judicial service toward civil service retirement; authorizes the AO Director to pay, under Judicial Conference-approved regulations, litigation costs of judges and judicial employees sued in their official capacities when a government attorney is not reasonably available; shifts appointment of Federal Public Defenders from the judicial councils to the courts of appeals; authorizes judges on official travel status for less than thirty days either per diem or actual expenses within the statutory maximum, but limits judges on official travel status for thirty days or more to actual expenses; makes clear that court sessions may be held at places where the AO provides accommodations or where these are available at no charge, assuming judicial council approval in both cases. The General Services Administration is to provide accommodations, and to close accommodations, at the request of the AO Director.

NORTHERN DISTRICT OF TEXAS SEEKING CLERK

Position: On or about January 1, 1983, or prior thereto, a vacancy will occur in the Office of Clerk of the United States District Court for the Northern District of Texas, with headquarters at Dallas, Texas. Under the direction of the judges of the court, the Clerk has administrative responsibilities for all aspects of the clerk's office operations, including the supervision of the deputy clerks' offices in six other divisions of the Northern District of Texas.

Qualifications: A minimum of ten years of progressively responsible administrative experience in either public service or private business, three of which years must have been in a position of substantial management responsibility. Under certain conditions, college degrees and other educational attainments may be substituted for some experience qualifications.

Entrance Salary: $46,685 to $57,000.

To Apply: Send resume to Chief Judge Halbert O. Woodward, C-210 United States Courthouse, 1205 Texas Avenue, Lubbock, Texas 79401-4096. All applications must be submitted on or before July 1, 1982.

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Every time the (judges) interpret contract, property, vested right . . . they necessarily enact into law parts of a system of social philosophy. . . . The decisions of the courts on economic and social questions depend on their economic and social philosophy.

Theodore Roosevelt.

PRISON INDUSTRIES RECOGNIZED

Awards were presented at a public ceremony in the U.S. District Court, Brooklyn, N.Y., on March 16, to the presidents of eleven large corporations by Chief Judge Jack B. Weinstein and Federal Bureau of Prisons Director Norman A. Carlson. Judge Weinstein expressed gratitude for the businessmen's guidance in updating the Electronic Cable Assembly Plant at the Danbury, Conn., Federal Prison. The ceremony marked one year of operation of a private advisory committee composed of these corporate representatives. The committee had been called into being to recommend policy changes which would make industrial and vocational training in the prison industry more commensurate with contemporary industry practices and more relevant for inmates anticipating reentrance into the civilian workforce.

The organizations honored were: New York Telephone, Con Edison, International Telephone and Telegraph, Bendix, Grumman, General Electric, Western Electric, Private Industry Council, Manhattan Cable T.V., Teleprompter, and H. G. Machine Tool.

LAW SCHOOL CLINICAL EXPERIENCE PROGRAM

Even if the Law School Clinical Experience Program survives another attempt by the Reagan Administration to rescind its funding, the maximum federal share for grants awarded under it for fiscal year 1982 will be 50 percent. Although program legislation permits a maximum federal share of 90 percent, program regulations permit Secretary of Education Terrel H. Bell to establish a lower federal share annually. "Support of clinical legal education is not considered a permanent federal responsibility," states Bell in a DOE notice published March 2 in the Federal Register. Rep. Neal Smith (D. Iowa), a staunch champion of law school clinical programs, is expected to lead the opposition to administration efforts to eliminate federal help for them.

CONFERENCE, from p. 1

4763) of salary. The legislation would also increase annuities for surviving minor dependent children. The Conference also endorsed adding to the pending legislation a provision for an "open election season" to allow judges either to join or to withdraw from the survivors' annuities program. Contributions to the retirement fund would increase from 4.5 percent of salary to 5 percent.

Following the recommendations of the Committee on the Judicial Branch, the Conference also endorsed those provisions of H.R. 4886 that would amend the Federal Salary Act of 1967, to require biennial, rather than quadrennial, adjustments of executive, legislative, and judicial salaries.

In addition, the Conference also endorsed its own, related, legislation, introduced in May 1981, to establish a separate biennial commission to set federal judges' salaries.

Further, the Conference stated its opposition to Senator Jesse Helms' bill, S. 1847, on judicial salaries and court funding, because it "seriously threatens the independence of the judicial branch." Currently, absent timely congressional disapproval, the cost-of-living salary increases that the President sends to Congress go into effect automatically upon the beginning of a new fiscal year. Once the increases go into effect for judicial salaries, however, Congress may not reduce them. The *United States* v. *Will* decisions confirmed the constitutionality of this mechanism. The Helms bill seeks congressional reversal of *Will* by allowing only those salary increases that Congress affirmatively and specifically authorizes to go into effect. S. 1847 would also require annual authorizations by Congress of the programs and operations of district and circuit judges, the Administrative Office, and the Federal Judicial Center. This provision in the Helms bill for more stringent and restrictive oversight of the higher courts in the federal judiciary would establish a system for the courts similar to the oversight process imposed on the Department of Justice in 1976 following Watergate.

Among other actions taken at the spring session, the Judicial Conference:

- Authorized draft legislation to amend 28 U.S.C. §371 to authorize a graduated scale of eligibility for retirement or resignation for Article III judges beginning at age 65 with fifteen years of service.
- Recommended draft legislation to establish a comprehensive retirement program for all Article I judicial branch judges, including a recommendation that 28 U.S.C. §373 be amended to provide that the right to receive an annuity vest after eight years of service (or after five years for disability retirement), that a full annuity be payable after fourteen years of service, and prorated for years served above eight and less than fourteen. The Conference also recommended that an Article I judge's annuity, other than a disability annuity, not commence until age 65.

In addition, it was the Conference's recommendation that the authorized legislation to be introduced in Congress include provision for U.S. Magistrates to elect retirement benefits under §373. Bankruptcy judges, who will be Article I judges after April 1, 1984, will be included in the program.

- Approved a Committee on Court Administration recommendation that, with certain exceptions, the Director of the Administrative Office be given the authority to fix the salaries of all Article I judges, as well as other supporting judiciary personnel, and to limit such salaries to 85 percent of the salary of district judges. The Judicial Conference would still exercise its supervision and control. The Conference authorized the preparation of necessary legislation and its transmission to Congress.
- Recommended the creation of three new, permanent judgeships for the Southern District of Florida. This action is in response to the Department of Justice's request and on motion of Eleventh Circuit Chief Judge John C. Godbold, in anticipation of increased criminal caseloads in that district to result from a major initiative against crime in southern Florida.
- On motion of First Circuit Chief Judge Frank Coffin, authorized the Chief Justice to appoint a small study group to consider methods of coordinating the selection of law clerks by federal judges.
- Disapproved S. 1532, which would require that parties or their attorneys be permitted to conduct the voir dire examination of jurors, in addition to a court's examination.
- Disapproved H.R. 3691, to the extent that it would allow an absolute right to jury trial in land condemnation cases and would remove the district court's discretion to appoint and receive findings of a three-person commission in lieu of a jury trial.
- Disapproved H.R. 4272, which would provide assistance of counsel for witnesses testifying before grand juries and authorize court appointment and compensation of counsel under the Criminal Justice Act for an indigent witness subpoenaed to appear before a grand jury.
- Recommended repeal of 28 U.S.C. §1393, providing for divisional venue in civil cases, and directed that an appropriately drafted bill be submitted to the Congress for its consideration.
- Authorized circulation to the bench and bar of proposed changes in court records disposition and preservation schedules.
- Reelected Howard T. Markey, Chief Judge of the Court of Customs and Patent Appeals, to another three-year term on the Board of Certification.

REPORT ON FEDERAL MAGISTRATES SYSTEM SUBMITTED TO CONGRESS

Responding to a statutory mandate, the Judicial Conference of the United States has completed an evaluation of the 1979 amendments to the Federal Magistrates Act, and assessed the future of the federal magistrates system.

The report of the Judicial Conference, dated December 1981, has now been submitted to Congress. In addition to reviewing the development and role of the magistrate system, the report offers conclusions and recommendations in response to questions posed by House and Senate Judiciary Committee members.

The conclusions of the report, some of which are listed below, are set out in three categories:

- **Organization of the Magistrate System.** The system should remain a part of the U.S. district courts and should not be reconstituted as a separate tier of the courts, the Conference concludes. To meet local requirements and conditions, the statute governing the magistrates system must retain maximum flexibility. Uniform court procedures should be encouraged, but flexibility must be possible for efficient operation of the system (such as assignment of duties to magistrates). A final conclusion in this area is that existing provisions governing selection, term, and removal of magistrates, in addition to statutorily granted authority, adequately protect their independence.

- **Jurisdiction of Magistrates.** Jurisdiction of the magistrates should remain "open," in the opinion of the Conference, and duties they perform should be determined through delegation from the district courts. Magistrates should not be authorized to accept guilty pleas in felony cases. Congress should consider the use of magistrates to dispose of a greater number of less serious criminal cases as misdemeanors, and this could be accomplished by downgrading some cases charged as felonies to misdemeanors and by designating additional offenses in the criminal code as misdemeanors.

- **Office of Magistrate.** The Conference pointed out that the official title "United States Magistrate" is appropriate; it is an honorable title; and the term has gained prestige and status through the substantial and effective contributions of the magistrates. The Judicial Conference disapproves the suggestion by a member of the Senate Judiciary Committee to change the title to "division judge" or "associate judge," because such a title "might blur very real distinctions in both status and function between Article III judges and magistrates." Support services and facilities presently provided the magistrates are found "generally adequate." Finally, the Conference recommended to Congress that the salaries of magistrates should be increased; and that the retirement system for magistrates should be improved.

A copy of the report has been mailed to all federal judges and judicial officers. Requests for copies should be addressed to Peter McCabe, Chief of the Magistrates Division, Administrative Office of the U.S. Courts, Washington, DC 20544. ▮▮▮

CHIEF JUSTICE CALLS FOR ATTENTION TO PROFESSIONAL STANDARDS

Law schools, the bar, and the bench all must act to insure that higher standards of responsibility permeate the legal profession, says Chief Justice Warren E. Burger in an article written for the Cleveland State Law Review (Volume 29, Numbers 3 & 4). He credits the organized bar with important strides and growing acceptance of newly restated professional ethical standards and with its response to the "Clark Report" of 1970. Nevertheless, the Chief Justice questions whether most jurisdictions have provided truly adequate enforcement of professional disciplinary rules to protect the public. "We can no longer tolerate faltering enforcement programs which diverge widely among the fifty states with the unhappy spectacle of the bar looking to the bench and the bench to the bar for action. While making state procedures modern and professional has led to an increase in discipline as well as voluntary resignations, too often even criminal prosecutions against lawyers do not result in significant disciplinary action." In England where discipline is strict it is exclusively in the hands of the bar subject to some judicial review, the Chief Justice noted.

Law schools, too, are taken to task by the Chief Justice for failing to assume responsibility for inculcating, in Harlan Fiske Stone's word's, "some knowledge of the social responsibility which rests upon a public profession." "Some law teachers," the Chief Justice continued, "do not believe that their function and the function of their schools is to teach these fundamentals of professional responsibility any more than to train trial advocates. Too many remark, '(W)e are teaching students to *think* —we are not running a trade school!' But lawyers who know how to think in legal terms, but have not learned how to behave, are a menace to society and a liability, not an asset, to the administration of justice." ▮▮▮

PERSONNEL

NOMINATIONS

William T. Hart, U.S. District Judge, N.D. IL, Mar. 11

John A. Nordberg, U.S. District Judge, N.D. IL, Mar. 11

Robert E. Coyle, U.S. District Judge, E.D. CA, Mar. 11

Walter E. Black, Jr., U.S. District Judge, D. MD, Mar. 11

Michael A. Telesca, U.S. District Judge, W.D. NY, Mar. 11

CONFIRMATIONS

Eugene F. Lynch, U.S. District Judge, N.D. CA, Mar. 4

Leroy J. Contie, Jr., U.S. Circuit Judge, CA-6, Mar. 4

Elizabeth A. Kovachevich, U.S. District Judge, M.D. FL, Mar. 4

Robert B. Krupansky, U.S. Circuit Judge, CA-6, Mar. 4

John R. Gibson, U.S. Circuit Judge, CA-8, Mar. 4

John L. Coffey, U.S. Circuit Judge, CA-7, Mar. 18

William W. Caldwell, U.S. District Judge, M.D. PA, Mar. 18

Glenn E. Mencer, U.S. District Judge, W.D. PA, Mar. 18

Carol Los Mansmann, U.S. District Judge, W.D. PA, Mar. 18

APPOINTMENTS

Robert H. Bork, U.S. Circuit Judge, CA-DC, Feb. 12

Michael S. Kanne, U.S. District Judge, N.D. IN, Feb. 24

James T. Moody, U.S. District Judge, N.D. IN, Feb. 24

ELEVATION

Sherman G. Finesilver, Chief Judge, D. CO, Apr. 8

SENIOR STATUS

Vincent P. Buinno, U.S. District Judge, D. NJ, Mar. 23

William P. Gray, U.S. District Judge, C.D. CA, Mar. 26

Roy L. Stephenson, U.S. Circuit Judge, CA-8, Apr. 1

Fred M. Winner, U.S. District Judge, D. CO, Apr. 8

DEATHS

Jack M. Gordon, U.S. District Judge, E.D. LA, Mar. 4

Henry S. Wise, U.S. District Judge, C.D. IL, Mar. 16

ao&fjc calendar

Apr. 5-7 Workshop for Judges of the Fourth Circuit

Apr. 14-16 Workshop for Judges of the D.C. and First Circuits

Apr. 21-23 Seminar for Bankruptcy Judges

Apr. 26-27 Sentencing Institute (Eighth and Tenth Circuits)

Apr. 28-30 Workshop for Judges of the Third Circuit

May 2-5 Fifth Circuit Judicial Conference

May 2-5 Eleventh Circuit Judicial Conference

May 5-7 Seminar for Bankruptcy Judges

May 7-8 Workshop for Judges of the Second Circuit

May 9-12 D.C. Circuit Judicial Conference

May 10-12 Workshop for Chief Deputy Clerks of Bankruptcy Courts

May 12 Teleconference for Probation Officers on White Collar Crime

May 13-14 Judicial Conference Advisory Committee on Bankruptcy Rules

May 17-18 Seventh Circuit Judicial Conference

May 18 Workshop for Judges of the Seventh Circuit

May 23-29 Seminar for Newly Appointed District Judges

May 24-25 Judicial Conference Subcommittee on Judicial Statistics

May 25-29 Orientation Seminar for Full-time and Part-time Magistrates

May 26-27 Regional Seminar for U.S. Probation Officers - Supervisory Skills Workshop

May 27-28 Judicial Advisory Committee on Civil Rules

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MAY 1982

President Reagan photographed at the White House on April 2 signing the "Federal Courts Improvement Act of 1982." Others attending the ceremony were (front row, l. to r.) Cong. Peter W. Rodino, Jr.; Cong. Robert McClory; Sen. Robert J. Dole; Sen. Paul Laxalt; and Secretary of Commerce Malcolm Baldrige. Back row (l. to r.) Fred F. Fielding, Counsel to the President; Attorney General William French Smith; Chief Judge Howard T. Markey (CCPA); former Assistant Attorney General and now Professor of Law at the University of Virginia Daniel J. Meador, and Chief Judge Daniel M. Friedman (Ct. of Claims). Photo by Bill Fitz-Patrick, The White House.

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INTERVIEW WITH SOLICITOR GENERAL REX E. LEE

Rex E. Lee is the 37th Solicitor General of the United States. An appointee of President Reagan, he took office last August.

Mr. Lee brings to his new office a varied background in private practice, government service, and academia. He was a law clerk for Justice Byron R. White, an Assistant Attorney General in charge of the Department of Justice's Civil Division, and a law professor and dean at the J. Reuben Clark Law School at Brigham Young University. He earned his J.D. at the University of Chicago.

In the following interview Solicitor General Lee talks about how he handles his important work and why he considers his latest position "a lawyer's dream come true."

See LEE, p. 4

LEAA CLOSES SHOP

The Law Enforcement Assistance Administration ceased to operate on April 15. In its heyday, between 1969 and 1980, LEAA received $7.7 billion in appropriations. With the exception of several programs which will continue to operate under another arm of the Department of Justice, neither the Carter nor the Reagan administration sought additional funding for LEAA. Grants made by LEAA for improvements in police work, corrections, and the courts are soon to terminate. Since 1979, in addition to LEAA, four separate agencies have been created within the Department of Justice to help state and local governments improve the quality of their criminal justice systems, conduct research on criminal justice, and compile and disseminate criminal justice statistics. The continuing agencies are: the National Institute of Justice; the Office of Justice Assistance, Research & Statistics; the Bureau of Justice Statistics; and the Office of Juvenile Justice and Delinquency Prevention.

The LEAA program represented, among other things, the federal government's most ambitious effort to provide funds for state court improvement. There was often considerable controversy between state court officials and the state executive branch-dominated agencies that distributed much of the LEAA funds, leading to 1976 amendments to the LEAA legislation designed to ensure greater judicial branch

See LEAA, p. 2

Ju. 10. 3/2:

LEAA, from p. 1

participation in the distribution of funds. In fact, the impact on state courts was considerable. The 1979 report of the Task Force of the Conferences of Chief Justices and of State Court Administrators pointed to "substantial benefits" to the state courts from the LEAA program, including "structural and organizational changes." The report noted the conclusion of former California state court administrator Ralph H. Kleps, that "any review of the past ten years must conclude that LEAA has been the single most powerful impetus for improvement in state court systems."

Currently pending in Congress is a proposal to create a State Justice Institute as a vehicle to provide modest federal funds to state courts.

LAWYERS EXPLAIN LACK OF PREPAREDNESS AT TRIAL

For several years, Dorothy Linder Maddi of the American Bar Foundation has conducted investigations into the competence of attorneys' performances in civil trials. Her early studies reflected the criticisms voiced by leading jurists, and examined the problem from judges' points of view (see Maddi, "Trial Advocacy Competence: The Judicial Perspective," 1978 A.B.F. Res. J. 105, and "Judges' Views of Lawyers in Their Court," 1979 A.B.F. Res. J. 689).

Noting that the individual critics of trial advocates' competence differed widely in assigning causes and cures for the problem, Maddi hypothesized "lack of preparedness as a symptom, not a cause" of poor performance, and turned the inquiry to lawyers to explain why they might be less well prepared at trial than they would prefer. Taking a random sampling of lawyers from the list of attorneys in the Cook County, Illinois, Jury Verdict Reporter, she surveyed one hundred trial lawyers to determine their perception of what factors affect their performance.

Among Maddi's findings, reported in "Improving Trial Adequacy: The Views of Trial Attorneys," 1981 A.B.F. Res. J. 1049:

- Eighty percent of the lawyers interviewed answered affirmatively to "Do you ever have difficulty being ready for trial?" Nearly one-half of these lawyers explained that the reason for their difficulty in being prepared is the "uncertainty of when a trial would actually begin." This difficulty is often compounded for litigators when they have more than one case on the trial call at the same time because of the uncertainty of the order in which their cases will be tried. Repeated continuances, many lawyers also complained, make the problems of client and witness availability especially difficult. The problem of scheduling medical witnesses was cited as particularly serious.
- The number of cases and other matters being handled by the ninety-three lawyers who responded to the question ranged from 6 to 1,000. Of the thirteen who had less than 50 matters pending, most were handling corporate and commercial matters. Twenty-eight lawyers were handling less than 100 matters; twenty-four were handling over 100 but less than 200; twenty-three had over 200 but less than 300; nine had over 300 but less than 400; and nine had over 400. Yet, only three of the lawyers interviewed claimed to consider their available time and workload when deciding to accept cases referred through ongoing relationships. The others claim they or their firms feel obliged to handle all such cases sent to them.
- In investigating what each lawyer had done at work on the day before the interview, Maddi found "striking" the wide range and number of matters dealt with and therefore the small segments of time spent on each. Sometimes the fragmentation of an individual lawyer's work is compounded by the way that lawyer's law firm organizes its work. It is not unusual for a firm, for example, to assign all the pretrial motion appearances for a firm's cases in a particular court to one junior member, who may not before have been involved with any of the cases. After being given a few-minute summary of each case by the firm's lawyer handling it, he then appears in court on perhaps "a half-dozen or more unrelated cases in a single morning."
- Often, trial lawyers are referred cases at the point that the case is scheduled for trial. If the file prepared by the previous attorney is incomplete, or insufficient discovery has been carried out, the lawyer (and client) have a grave problem, since time for discovery has by then usually run out. In some extreme situations it was reported that "cases are referred or assigned to trial lawyers so late that...the trial lawyer had to read the file to find out what the case was about while selecting a jury, or for bench trials while walking to the courthouse."
- Echoing recent observations by the Chief Justice and others, the study revealed that many lawyers begin trying cases with inadequate training. Almost one-quarter of the respondents reported that they had tried their first case without even having observed a trial. The majority of the respondents had had no formal training in advocacy, and only about half had had "mentors" to coach them in trial advocacy.

The Third Branch

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Co-editors:

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts

Joyce H. Plotnikoff (above) is this year's Tom C. Clark Judicial Fellow. Each year, through a fund created by the former law clerks to Justice Clark, one of the incumbent Judicial Fellows is designated a Tom C. Clark Fellow.

LAW STUDENTS INCREASE

The total number of law school students in law schools approved by the ABA has risen again, this time by 1.7 percent over those enrolled during 1980-81. One law school was added to the approved list during the year, making a total of 172, but even without counting that school's enrollees, the percent of increase was 1.62 percent.

The number of women enrolled in the first year of law school grew nearly 3.5 percent, a smaller increase than in the few preceding years. Nevertheless, the total female 1981-82 enrollment is 106 percent higher than in 1974. Women now represent over 35 percent of law school students, compared to about 20 percent in 1974.

IN MEMORIAM: ABE FORTAS

June 19, 1910—April 5, 1982

Former Supreme Court Justice Abe Fortas died of a heart attack on April 5, just a few days after his appearance as counsel before the Court on which he had served from October 4, 1965, to May 14, 1969.

As a writer, government official, law professor, lawyer, and judge, Abe Fortas left an indelible mark on the legal profession. The following are excerpted from his writings.

* * *

I believe this case dramatically illustrates that you cannot have a fair trial without counsel. Under our adversary system of justice, how can our civilized nation pretend that there is a fair trial without the counsel for the prosecution doing all he can within the limits of decency, and the counsel for the defense doing his best within the same limits, and from that clash will emerge the truth?

—Oral argument before the Supreme Court, as counsel to Clarence Earl Gideon, January 15, 1963.

* * *

Dissent and dissenters have no monopoly on freedom. They must tolerate opposition. They must accept dissent from their dissent. And they must give it the respect and the latitude which they claim for themselves.

—The Limits of Civil Disobedience," *The New York Times Magazine,* May 12, 1968.

* * *

The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

—Epperson v. *Arkansas,* 393 U.S. 97, 104 (1968).

* * *

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

—Tinker v. *Des Moines School District,* 393 U.S. 503, 511 (1969).

* * *

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

—Id. at 513.

* * *

Under our Constitution, the condition of being a boy does not justify a kangaroo court.

—In Re Gault, 387 U.S. 1, 28 (1967).

LEE from p. 1

It has been over a year since we interviewed former Solicitor General Wade McCree. He explained then how his office selected cases for which petitions for writ of certiorari would be filed. Would you explain how that process now works; in particular, are there any significant changes in this procedure from past administrations?

Let me answer the second question first. There really aren't any significant changes. Now, they change in the sense that people change and their substantive views change. And certainly many of my ideas about policy are different from those of some of my predecessors. But insofar as this matter is concerned, the procedures that we use to determine in which kinds of cases we are going to seek certiorari, they really are quite constant over the years.

In order to understand how the process works you need to understand, first of all, that the Solicitor General's Office is a client-oriented operation. That is, we do not make the substantive policies in this office that we espouse in court. Those are made somewhere else, in the various departments and agencies whose views we represent in court, and as a consequence the starting point really is in the department or agency of government whose substantive policy is affected. That agency sends us a recommendation as to whether a petition for certiorari should or should not be filed in any given case. That will go through the litigating division that handled the case in the lower court and that litigating division in turn will also give us its recommendation. If there were a United States Attorney involved in the case we would have his or her recommendation as well. Then once it gets to this office we look at it and a recommendation is prepared by people in this office—usually, two people—and then I make the final decision.

Among the factors that we take into account are these: First, whether the importance of the case to the government warrants invoking the Supreme Court's scarce resources to consider that case. The government is different from any other litigant before the Supreme Court in that respect. We are also a coordinated branch of government with the Court. As a consequence we are cautious about not asking the Court to grant certiorari in any case that we conclude is not quite important to the government. The next thing we take into account is whether there is a conflict in the circuits. The existence of a conflict does not always indicate that we should ask for certiorari, but if it relates to an important matter that ought to be resolved, then that's another factor that we take into account. The third factor is whether the particular case is the most appropriate vehicle for resolving the conflict.

And your background as a law clerk at the Court gives you some insight on such matters?

It helps; there is no question about that. There is some similarity between serving as a law clerk and serving as Solicitor General because you develop a "feel" for the kinds of cases the Court is likely to be interested in.

To what extent does administration policy control your decision to seek Supreme Court review? Are you asked to target certain issues for review?

That question is capable of being read in at least a couple of ways. In one respect I have answered it, and that is that the policies that we seek to vindicate are not made in this office. They are made somewhere else. They are made in other departments and agencies. So, to that extent, administration policy does control our decision, because as the cases come up they involve policies that are made somewhere else.

I think Immigration and Naturalization Service *v.* Chadha *is one of the most important issues the Court has considered in several years.*

To what extent is this done at the White House level?

Practically not at all. There is a tradition of independence that the Justice Department enjoys in making litigating decisions for the government as a whole and there is a further layer of insulation that the Solicitor General's office enjoys. That's a good tradition. It not only serves government well; it also serves the particular administration, because the best way to have an effective litigation effort is to have the courts know that independent litigating judgments are being made by professional lawyers and not solely on the basis of political considerations. And if, in that kind of setting, you put into the crucial decisionmaking positions people who share the substantive views of the President, then the litigators can most effectively serve the President's objectives.

In your opinion, what are some of the most important issues that your office will argue before the Court this term?

In my opinion the most important case that we argued before the Court this term was the legislative veto case, *Immigration and Naturalization Service v. Chadha* (No. 80-1832). I think it is one of the most important issues the Court has considered in several years. In addition there were two cases this term involving Tenth Amendment issues, an important Article III case, a couple of busing cases, and some important Fourth Amendment issues. Those are some that come to mind.

How do you decide which cases you will argue yourself and which to assign to other attorneys in your office? Also, whether attorneys in other agencies will participate in the argument?

One of the very important functions of my office is to decide who argues cases. I will tell you there is no shortage of candidates. There are many, many people who would like to argue them. I do it after careful consultation, rather lengthy consultation, with my deputies. There is one overriding question that we ask: who could do it most effectively and how would the government's case best be advanced by the oral argument.

There are some kinds of cases that are more appropriate to be argued by a person who holds a particular office in government. There are sometimes cases that are more appropriately argued, for example, by the Solicitor General or by an Assistant Attorney General. The tradition has been that the hardest cases—the most important cases—usually are argued by the Solicitor General. That's his job; that's what he is appointed to do. It's a tradition that I think is appropriate. It's appropriate not only because it comes with the job but also, I think, the Court has the right to expect that the one person in this office who has the authority to speak for the government will be there in Court in order to answer the Justices' questions on the important cases.

Attorney General Smith has said that he will ask his attorneys to "urge" courts to desist from policymaking. What arguments can they make that have not been previously made?

The basic thought that the Attorney General was expressing there and the premise on which we are proceeding is that in the great majority of those instances where courts have gone too far in intruding into areas that ought to be decided by the legislature—they have done so because lawyers have asked them to do so.

You pick your favorite example of judicial restraint and chances are that some lawyer in that case was advocating either that position or perhaps something a bit

See LEE, p. 6

CONGRESS OUTSIDE JURISDICTION WITH ANTIBUSING BILLS, EX-OFFICIALS CONTEND

Four former Attorneys General and three former Solicitors General have gone on record as opposing legislation that would limit future federal court school desegregation orders. In a letter dated March 28 and sent to members of the Senate Judiciary Committee, the seven denounced two antibusing bills, in particular: S. 1760, sponsored by Senator Orrin G. Hatch (R-Utah), and S. 1647, sponsored by Senator John P. East (R-N.C.). These bills, approved by subcommittees, are pending in the Senate Judiciary Committee. S. 1743, identical to S. 1647 and sponsored by Senator Jesse Helms (R-N.C.), is also pending in the Senate. These bills would prohibit federal courts from ordering such remedies as mandatory student assignments and busing of students outside areas where they reside.

While the seven said they "hold varying views on...many areas of constitutional law....on two matters [they] are unanimous. The first of these is that the Supreme Court was wholly correct in deciding in *Brown* v. *Board of Education* that 'in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal'.... The second view...we all share is that Congress is not empowered by the Constitution selectively to restrict the jurisdiction of the federal courts to prevent them from enforcing *Brown* in full measure."

By depriving the courts of jurisdiction to issue orders "essential" to carry out *Brown,* the bills in question not only "do so prospectively but by causing the reopening and truncating of orders in long-concluded lawsuits they would truly reverse the course on which *Brown* set this Nation. These bills would exercise power which we believe the Congress does not possess."

The former Attorneys General who signed the letter are Benjamin R. Civiletti, who served under President Carter; Elliot L. Richardson, who served under President Nixon; and Nicholas deB. Katzenbach and Ramsey Clark, who both served under President Johnson.

The former Solicitors General were Wade H. McCree, Jr., who served under President Carter; Erwin N. Griswold, who served under Presidents Johnson and Nixon; and J. Lee Rankin, who served under President Eisenhower.

LEE from p. 5

more extreme. What we are saying is that we can help to take some of the pressure off the judges in that respect—by not asking them to go so far in substituting judicial judgment for legislative judgment in those cases where that is what is really occurring.

There is a particular responsibility of the federal government to do that for several reasons. One is that the federal government is far and away the principal litigator in the United States courts. By virtue of the sheer volume of the cases that we handle, we are in a better position to assist the courts in this respect than anyone else.

The second is that we have a greater interest in it. Any lawyer who appears before the courts is both an advocate in the particular case and also an officer of the court. But the United States, in addition to being a party in the particular case, also has an interest in government itself and that means the preservation of the proper role of the courts. We believe that judicial restraint, as the name implies, means that the courts should recognize that, in rendering decisions holding a statute unconstitutional, the effect is to displace a legislative judgment. As a consequence they should undertake that task only where there are strong reasons to do so.

There is a tradition of independence that the Justice Department enjoys in making litigating decisions for the government as a whole and there is a further layer of insulation that the Solicitor General's office enjoys. That's a good tradition.

What were some of your thoughts as you made the transition from academia to what must be one of the most exclusive law offices in the country?

I love my job. This job is a lawyer's dream come true. There is nothing that I have ever enjoyed quite as much as appellate advocacy. The pinnacle of appellate advocacy is Supreme Court work and that is mostly what I do now.

There is a remarkably closer relationship—a closer fit—between my work as an academic and my work as Solicitor General than you might think because both callings deal with conceptual matters and with the intersections between law and policy. Intersections in the sense, not that I make policy—I didn't make it in academia, and I don't make it here—but in the sense that I come to grips with the lawyers' efforts to have policy implemented through the courts.

Do you feel as a law professor and dean of a law school that the law schools are adequately preparing the law students to enter the legal profession?

I am concerned about the quality of advocacy in the courts and I am sure all members of my profession are. I am skeptical about the extent to which the law schools are the panacea. Go up and sit in the courtroom where I now make a living and you will hear good advocacy and you will hear bad advocacy—oral advocacy. Read the briefs that go into that court and you will see some good ones and you will see some bad ones. The good performances do not always come from the experienced lawyers. They certainly do not always come from the lawyers who have gone to law schools that had extensive advocacy type programs.

The other reason that I think the law schools are not the sole answer to the problem of the quality of advocacy is that there is no way in a three-year period that the law schools can do a complete job of imparting practical skills training to the lawyer. I think that we will see a material increase in the quality of advocacy in this country when we recognize that the responsibility for skills training is shared by the entire profession. For the good lawyer the training period lasts as long as he or she practices. The burden of legal education, therefore, is vested not just in the law schools because you can't do it in three years. It is a training and a teaching responsibility that lasts over forty years and not just three.

It has been reported that the newly formed Legal Affairs Council will consider and decide in which cases the Department of Justice will file amicus curiae briefs. Does this mean a change in procedures you presently follow?

I'm delighted that you asked that question. I have looked for every opportunity that I could to address that issue because there was a very important 180-degree misstatement concerning this matter.

Was it in the press?

Oh yes, it was in the *Washington Post.* The report was that this new Cabinet Council on Legal Affairs would consider what cases the government would appeal and what positions it would take, what *amicus* briefs it would file, and what positions it would take on appeal. I was astounded when I read that article. I said to myself "that sounds just like my job description." And it's just flat wrong. Unfortunately, the media have not picked up the correction. I don't know where the error came from, but I am pleased to assure your readers that the determinations concerning the positions the United States will take on appeal and what *amicus* briefs we will file have always been made by the Solicitor General and will continue to be.

It has been made very clear that there are two things that the Cabinet Council will not do. One is that it will not consider any matters related to any pending case, either in the Supreme Court or anywhere else. That is *not* the function of the Cabinet Council; it

See LEE, p. 7

Noteworthy

Ralph H. Kelley, U.S. Bankruptcy Court Judge at Chattanooga, Tennessee, ruled last month that the federal bankruptcy courts, created by Congress in 1978, are unconstitutional. Bankruptcy Judge Kelley based his reasoning on the fact that Article III federal judges have life tenure, higher salaries, and serve "on good behavior," whereas the bankruptcy judges serve for stated terms.

In a brief order a year ago Chief Judge Miles Lord (D. Minn.) stated that "the delegation of authority in 28 U.S.C. §1471 to bankruptcy judges to try a case which is otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority." This case is now awaiting disposition by the U.S. Supreme Court.

* * *

Judges of the current U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals, who will be the members of the new Court of Appeals for the Federal Circuit, met in Washington on April 13 for some early planning. Agreed upon at this informal meeting was the matter of admission to practice before the bar of the new court. Attorneys with standing in the bars of the two current courts will be admitted automatically to the new court's bar.

Proposed new rules are now under study by the judges, and will undergo closer scrutiny at the Circuit Judicial Conference of the CCPA to convene on May 25. Judges of the Court of Claims and members of its bar have also been invited to the Conference, which will concentrate on the recent legislation merging the two courts. The agenda for the May meeting includes questions about the proper jurisdiction for patent appeals.

BARRETT McGURN, SUPREME COURT PRESS OFFICER, RETIRING

After nine years' service as the Supreme Court's Public Information Officer, Barrett McGurn is retiring from this position on July 30.

When Mr. McGurn came to the Court in 1973 he brought to the position a distinguished background as a reporter and correspondent, and subsequent years' service as a government information officer in the American embassies in Rome and Saigon, as well as the Department of State in Washington.

In accepting McGurn's resignation the Chief Justice said: "I know I speak for all my colleagues and Officers of the Court in expressing appreciation for your service and wishing you all the best in the years ahead."

(See related announcement p. 8.)

ESTATE ADMINISTRATOR
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Supervision of estates, trustees, etc. in the Jacksonville-Orlando Divisions. JD or MBA required. Experience in bankruptcy practice and procedure helpful but not essential. Salary $23,566—$33,586 commensurate with experience. Resumes should be submitted by May 14, 1982, to: Clerk, U.S. Bankruptcy Court, P.O. Box 559, Jacksonville, FL 32201.
EQUAL OPPORTUNITY EMPLOYER.

LEE from p. 6

is the function of the Attorney General. And as far as the Supreme Court is concerned, it is the Solicitor General exercising the Attorney General's authority.

The second is that it will not render legal advice. That is the function, again, of the Attorney General acting through the Office of Legal Counsel. Now what it will do is to deal with policy issues that affect different departments of the government such as drug enforcement, and immigration problems, and that kind of thing.

EQUAL JUSTICE UNDER THE LAW COPYRIGHT UPHELD

The Supreme Court has left intact a ruling of the D.C. Circuit that the televison series, "Equal Justice Under The Law," could be copyrighted by the public television stations that produced and broadcast it and that the copyright could be transferred to the government. *Schnapper* v. *Foley,* No. 81-1215. The films had been commissioned by the Judicial Conference as a bicentennial project.

The Court of Appeals held that while both the 1976 and 1909 copyright acts deny copyright protection to any work prepared by the government, the acts do permit the government to receive and hold copyrights transferred or assigned to it.

The series of five films dramatizes four early constitutional cases of "enduring significance": *Marbury* v. *Madison, McCulloch* v. *Maryland, Gibbons* v. *Ogden,* and the trial of Aaron Burr.

* * * *

Videocassettes (three-quarter-inch U-matic or one-half-inch VHS) and sixteen-millimeter films of the "Equal Justice Under Law" series may be borrowed for short periods from the FJC, at no charge. Please put requests in writing, specifying the format desired, to John Hawkins, Media Services Unit, Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005.

Alternatively, the series may be purchased in either film or cassette form, or rented in sixteen-millimeter only, from the National Audiovisual Center, General Services Administration, Information Services Section, Washington, D.C. 20409. For further information, call (301) 763-1896.

PERSONNEL

NOMINATIONS

George C. Pratt, U.S. Circuit Judge, CA-2, Apr. 26
Maurice M. Paul, U.S. District Judge, N.D., FL, Apr. 26
A.J. McNamara, U.S. District Judge, E.D. LA, May 5
John W. Potter,, U.S. District Judge, N.D. OH, May 5

CONFIRMATIONS

Robert E. Coyle, U.S. District Judge, E.D. CA, Mar. 31
William T. Hart, U.S. District Judge, N.D. IL, Apr. 20
John A. Nordberg, U.S. District Judge, N.D. IL, Apr. 20
Walter E. Black, Jr., U.S. District Judge, D. MD, Apr. 20
Michael A. Telesca, U.S. District Judge, W.D. NY, Apr. 20

APPOINTMENTS

Eugene F. Lynch, U.S. District Judge, N.D. CA, Mar. 11
Elizabeth A. Kovachevich, U.S. District Judge, M.D. FL, Mar. 12
Robert B. Krupansky, U.S. Circuit Judge, CA-6, Mar. 19
John L. Coffey, U.S. Circuit Judge, CA-7, Mar. 27
Leroy J. Contie, Jr., U.S. Circuit Judge, CA-6, Mar. 23
John R. Gibson, U.S. Circuit Judge, CA-8, Mar. 30

DEATHS

Herbert S. Boreman, U.S. Circuit Judge, CA-4, Mar. 26
Scovel Richardson, Judge, U.S. Court of International Trade, Mar. 30
Abe Fortas, former Associate Justice, Supreme Court of the United States, Apr. 5

SUPREME COURT PUBLIC INFORMATION OFFICER

DESCRIPTION: Public information responsibilities for the Supreme Court. Duties include disseminating public information about the activities of the Supreme Court to the news media and public; handling press inquiries; distributing opinions and supplying information on cases before the Court; publishing an in-house news bulletin and supervising a small office staff.

QUALIFICATIONS: Minimum of 3-5 yrs. experience as public information officer or similar official in position affording regular contact with news media. Thorough general understanding of legal issues and of the appellate process very desirable. Good judgment, proven communication skills and basic supervisory skills required.

SALARY: From SCP-12/3 ($30,129) depending upon experience, qualifications, and prior salary history.

CLOSING DATE: June 4, 1982

Send standard federal government form 171 to: James A. Robbins, Personnel & Organizational Development Officer, Supreme Court of the United States, Washington, DC 20543.

ao aofjc calendar

May 17-18 Seventh Circuit Judicial Conference
May 18 Workshop for Judges of the Seventh Circuit
May 23-29 Seminar for Newly Appointed District Judges
May 24-25 Judicial Conference Subcommittee on Judicial Statistics
May 25-29 Orientation Seminar for Full-time and Part-time Magistrates
May 26-27 Regional Seminar for Probation Officers—Supervisory Skills
May 27-28 Judicial Conference Advisory Committee on Civil Rules
June 3-4 Judicial Conference Subcommittee on Judicial Improvements
June 7-8 Judicial Conference Advisory Committee on Bankruptcy Rules
June 13-25 Trial Advocacy Training for Assistant Federal Defenders
June 14-15 Judicial Conference Subcommittee on Supporting Personnel
June 17-18 Judicial Conference Committee on Administration of the Bankruptcy System

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JUNE 1982

Closing ceremony of the U.S. District Court for the Canal Zone, March 31. Pictured (l. to r.) are Woodrow de Castro, attorney, Chief Judge Charles Clark (CA-5), Sarah Belzer, clerk, and Judge Morey L. Sear (E.D. LA). See story, p. 2.

INTERVIEW WITH CHIEF JUDGE FRANK M. COFFIN

Chief Judge Frank M. Coffin will soon mark his seventeenth year on the bench of the First Circuit and his tenth as Chief Judge. His thoughtful and scholarly assessments of the art of judging and of changing society's impacts on the judicial system are known to those familiar with his writings. On a recent stopover in Washington, Coffin generously agreed to share with us his opinions on a variety of issues.

* * *

You have broad experience, having served in all three branches of the federal government as well as private practice. What influenced you to take the judicial route? In which branch have you achieved the greatest satisfaction?

Nothing influenced me to take the route in the sense of a goal toward which I consciously strove. A judgeship was the last thing on my mind. I practiced law, I had been in politics and served in

See COFFIN, p. 3

U.S. JUDGES TO HELP FLORIDA TASK FORCE

Federal officials, the public, and the media in Florida are lauding the commitment of the federal judiciary to support the recently established federal task force to aid crime-plagued South Florida. "The federal judges who will be coming here on rotation," said one on-location task force spokesman, "have been eagerly anticipated."

Forty visiting judges in all, or four extra judges each month for ten months, will sit in the Southern District to help whittle down that district's existing backlog of cases, in anticipation of increases in drug prosecutions. The first four judges to serve are Mark A. Costantino (E.D. NY), T.F. Gilroy Daly (D. CT), David S. Nelson (D. MA), and Louis F. Oberdorfer (D.DC). They began service June 1 and will remain in Southern Florida until June 30.

Three extra courtrooms in Miami are currently available, and a fourth one is being readied in Fort Lauderdale. The President's Task Force was set in motion in January. Since mid-March there has been a large influx of temporary federal law enforcement agents into South Florida. Patrols in nearby coastal waters and the high seas between Florida and the Caribbean countries from which the illegal drugs coming into Florida flow, have been stepped up as has

See FLORIDA, p. 2

Ju 10.3/2:

U.S. DISTRICT COURT FOR CANAL ZONE CLOSES IN ACCORDANCE WITH PANAMA CANAL TREATY

A unique event in the history of the federal judiciary occurred on March 31. The U.S. District Court for the District of the Canal Zone terminated its jurisdiction after over sixty years of service. At a ceremony attended by Chief Judge Charles Clark (CA-5), Judge Morey L. Sear (E.D. LA) and representatives of the Canal Zone and Panamanian bars, the court officially closed.

The first U.S. court with jurisdiction in the Canal Zone was the Supreme Court of the Canal Zone created by the Isthmian Canal Commission on August 16, 1904. On April 1, 1914, that court was designated the U.S. District Court for the District of the Canal Zone. The first district judge was William H. Jackson. In all, eleven judges were appointed to serve as district judges in the Canal Zone. The last was Guthrie F. Crowe, who retired in 1977.

At the time of Judge Crowe's retirement, treaty negotiations between the U.S. and Panama had begun and President Carter chose not to appoint a successor. Instead he called upon the chief judge of the Fifth Circuit, which had appellate jurisdiction over the Canal Zone, to provide judges to conduct the court's affairs.

From May 1977 until its closing, twenty-eight district judges and two circuit judges served in the District Court.

The Panama Canal Treaty became effective on October 1, 1979. It provided for a thirty-month transition period, during which U.S. courts would have no jurisdiction over new private civil cases but would retain jurisdiction over civil cases already instituted as well as over certain criminal matters involving U.S. citizen employees of the Panama Canal Commission and their dependents and members of the U.S. armed forces and their dependents. At the end of the transition period all jurisdiction would cease and the former Canal Zone would be under the jurisdiction of the Panamanian courts.

On July 1, 1979, Judge Sear was appointed to handle the court's affairs. When the treaty entered into force, 712 civil cases and 96 criminal cases were pending. At the time of the court's closing, the docket had been completely disposed of.

FLORIDA from p. 1

the surveillance of the airspace above Florida and its environs. Customs, DEA, FBI, IRS, and Treasury agents have been increased along with additional Coast Guard cutters, Army pilots and cobra helicopters, and Navy pilots and E2C aircraft ("mini-AWACs").

Coordinator for the task force in Florida, Charles F. Rinkevich (who coordinated the recent task force in Atlanta formed as a result of numerous murders of black children) has been widely quoted in the media as saying that the previous flood of narcotics coming into the area already has been reduced to a "trickle." The number of indictments for federal drug violations is on the rise, however, and interceptions of drugs have taken a new turn recently. Now, says Stanley Marcus, new U.S. Attorney for Florida, task force personnel are witnessing a substantial increase in the number of "mule cases," prosecutions of smugglers intercepted while carrying in drugs on their persons or in their handbags and suitcases. A.O. statistics on the numbers of criminal defendants filed in the Southern District of Florida show increases in January and February 1982 of 77 percent and 72 percent, respectively, over corresponding months in 1981. And, although March 1982 figures show an 11 percent decline, the A.O. projects an overall increase for calendar year 1982 of nearly 36 percent more criminal defendants than in 1981.

To prevent scheduling problems, local federal judges are expected to continue to handle long trials, while shorter ones will be assigned to visiting judges on rotation. The Southern District has virtually no backlog of criminal cases, but does have a significant civil backlog. Rotating judges, it is expected, will be of inestimable aid in meeting the projected increase in filings as well as helping to reduce the backlog.

Extra staff have been authorized for the court, where particular needs have been anticipated, as for interpreters and court reporters. Pretrial services personnel have been on-site for some time, and the Probation Office has offered its employees—particularly those with fluency in Spanish—either temporary or permanent transfers to South Florida. In addition, the U.S. Marshals Service expects to increase its staff in the district.

The Third Branch

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Co-editors:

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

COFFIN from p. 1

the House of Representatives, and I had served in the executive branch in Washington and then later in Paris. Each new change in course came without advance planning, and so did my judgeship.

In fact, I was in Paris when Chief Judge Woodbury of our Court of Appeals took senior status, and the first inkling I had that this judgeship was a possibility is when a friend called transatlantic and said, "Judge Woodbury has retired and your name is being mentioned. Would you be interested?" Immediately, without any conscious thought, I said, "Of course, I would be," and I have since wondered why I was so ready to answer. But I think it had always been a goal—or cherished occupation may be a better way to put it—even though a subliminal one, as I left the active practice of law and went into lawmaking and law-executing. I have always looked to people like Judge Hand and Justice Holmes as some role models that meant the most to me. So it was just a value judgment that I found myself expressing without thinking about it.

And as to the second part of the question: I am having a great deal of fun, and I'm doing exactly what I want to do at this period of my life. I am very glad, however, that I practiced law, that I litigated, that I was in politics, that I served in the Congress, and that I had the experience in the executive branch and diplomatic service, too. But that's out of my system, and right now what I enjoy is dealing with cases, sometimes important cases, where—and this is the beauty of judging as Justice Black once said—judges by and large do their own work.

In a recent interview, former Justice Potter Stewart discussed the importance of collegiality in the courts and favorably compared collegiality in the Sixth Circuit with that in the U.S. Supreme Court. In your view, what is so important about collegiality?

What is so important about collegiality is that it is the very essence of the function for which society has created the Courts of Appeals. It wants collegial decisions, not decisions of one person. I think collegiality is a pearl of great price, and it's much easier for a very small court like ours to achieve than a very large court. But the beauty of it is that colleagues contribute to an opinion either by way of clarifying it, changing its thrust, strengthening the reasoning, or perhaps justifiably narrowing the scope of the decision.

"I have not seen any judge in my experience who lusts to go out and arrogate to himself the massive, arduous, and long-continuing task of institutional reform."

The benefit of collegiality, then, is that the opinion is immeasurably enriched when it is a truly collegial one. The burden is that one's pride of authorship is always challenged. One has to bite one's lip when a colleague intrudes upon a very favorite paragraph or phrase.

It does take time and sometimes the process degenerates into unnecessary nitpicking. But on the whole I think it is the genius of the appellate court system, and the threats to it lie in numbers of judges and numbers of cases. Already we are no longer three judges in the First Circuit; we are four judges. And already, time is a matter of great pressure and we don't have the leisure to deal with the opinions that we used to have when I came on our court in 1965.

We had 199 new cases filed during that fiscal year—199 cases for that twelve-month period. The statistics that we have for the last twelve-month period, ending in September 1981, show that appeals were up to almost a thousand a year. And the first two months of this year we are filing appeals at the rate of well in excess of a hundred cases a month. So we are at the twelve hundred case level. This means that collegiality for most courts today, and for us in the future, has got to be a matter of self-conscious striving rather than something that happens naturally.

You describe in your book, *The Ways of a Judge,* the evolution of the concept of the proper role of the judge from the oracular role to Alexander Bickel's view of the judge as a leader of opinion. There are now calls for a halt to judicial activism, for limitations and restraints on the judge's function. How do you view these demands? Do they interrupt the evolution of the philosophy of judging or are they part of an ongoing evolution?

I think the two perspectives, the hammer and anvil of activism and restraint, are always part of the thinking about the judicial process. At various times the emphasis is on the hammer and at various times on the anvil. My view of this whole subject of judicial activism is that it is overdone as a litmus paper test of judges. In my book, I talked about the fact that the term applies to some judges on some issues some of the time, but it is vastly overused.

We can think of activism on three levels. The first level, that of impressions conveyed by some political speeches and cartoons, editorials, headlines, and columnists, pictures judges like vultures high up on a tree waiting to pounce upon a case and carry it into his or her courtroom so that the judge can then engage in great social reform. I don't really think this is realistic. I have not seen any judge in my experience

See COFFIN, p. 4

COFFIN from p. 3

who lusts to go out and arrogate to himself the massive, arduous, and long-continuing task of institutional reform.

The second level is activism with regard to individual rights, and I can't improve on what Justice Stewart said in his January interview for *The Third Branch* where he said judges become involved in prison or mental health reform cases or welfare cases when there is an impasse, when the executive branch and legislative branch efforts have broken down and individuals have real problems. And he said that if the courts find that the Constitution requires a certain level of consideration and that level has not been met, then it's up to the courts to devise a remedy. I would add to what Justice Stewart said by stating that whether that's "activism" or not depends upon your point of view, your starting point. If your starting point is the preservation of the ease of operation of society or the workability of established institutions, then it's activism when a court proclaims a right of an individual against that institution.

But if your starting point is the individual, a ruling that favors the institution can also be considered activist. For example, when a court comes to a case pitting an individual against an institution or a majority, or a corporation or some other entity and the court says, "No, we will hold our hand waiting for this other institutional body to right things," that's not value-free. As I said earlier, it is tilting toward the entity that is opposing the individual. It is saying that we are favoring the values symbolized by that entity for the time being and the individual's got to wait. It is not really restraint because it is foreordaining the result of that judicial contest by inaction. In other words, it is the old familiar philosophical dilemma that we influence results by inaction just as much as we do by action.

There is no way of prescribing one point of view. At different times society needs a little help to withstand the onslaughts against it; yet there are many more times when individuals obviously need concern, and there will always be disagreements over which should have the balance in a given case.

Finally, activism more often than not these days is discussed in terms of remedy. That is, once a right has been established and once there is a class action suit and suits seeking institutional reform or long-continued injunctive relief, we haven't yet thought what the proper role, the proper weapons, or instruments available to a judge might be, or what the proper relationship should be between the trial court and the appellate court. The object in these cases is not so much to say who's right and who's wrong and who wins and who loses, but how to shape an institution to provide services at minimally decent constitutional levels. I think this area is one for increased and continued scrutiny because it spawns a lot of controversy about activism.

My concluding thought about activism is that it's no great service to talk in generalities and use the label to discuss judges without considering the nature of what you are talking about: the justification for the judge's action, or the alternatives if the judge didn't act. But having said that, I'm sure that it still remains that activism versus restraint is going to be a theme as long as we live, just as Parmenides and Heraclitus have shared the spotlight for almost three thousand years.

In your book you comment on the charge that the judiciary is the least democratic branch of government. Would you summarize your response to that charge?

This is the most familiar description of the judiciary—undoubtedly justified insofar as it refers to the inability to remove federal judges. To the extent that we are neither elected by people nor removable by people so long as we behave ourselves, the judicial branch is not democratic. But the point I went on to make was really the point that interests people, or should interest people, and that is the extent of accountability. And my conclusion was that we are not noticeably less accountable than legislative and executive personnel.

The legislature, specifically the Congress, of course, is subject to reelection every two and six years. But in the course of congressmen's parliamentary careers, their record is one that's very difficult to ascertain. There are so many different types of votes at so many stages of a particular bill that it takes a very shrewd observer indeed to compile an accurate legislative record of a given legislator.

The president is, of course, the most accountable in that he is the subject of sharp focus every day of his career. And yet we know that, for all of that, accountability is sometimes eluded, as happened for a year or more in the Watergate affair. The mere fact that there is extensive media coverage does not necessarily mean that there is strict accountability.

Judges not only can't choose their cases but once a case is before them, they are subject to certain rules. There must be a printed record. The appellate court is confined to the record, and the judge who writes the decision has got to persuade his colleagues. And then they all have to agree on something in writing. That, in turn, is subject to review, even though a remote chance of review, by the Supreme Court. But, not unimportantly, even the Supreme Court's opinion is subject to comment in scholarly journals and among the bar. The sum total of all of these restraints amounts to substantial accountability.

See COFFIN, p. 5

COFFIN from p. 4

I should add that we now have a new kind of accountability with considerable teeth in it in the new Judicial Council and Reform Act which vests judicial councils with a very real power to look into complaints against judges and the power to recommend or withhold certain sanctions. So, whether that adds up to as much accountability as a congressman or an executive branch official or the president, I don't know, but it seems to me it is far more than most people think.

Courts of appeals have been restricting oral argument. What are your views on the importance of oral argument on the appellate level?

Oral argument is vital. Yet we have no choice but to restrict it in time simply because of the pressure of cases. But a good oral advocate today can accomplish in fifteen or twenty minutes all that is necessary. The days of the one-hour oral argument are over except for very rare and complicated cases, perhaps cases with many parties.

Oral argument is important partly because it helps the judges do a better quality job. It also helps the advocate occasionally—once in a while, when a case is very evenly balanced—to win. That may be a very small minority of the cases but it happens once a term. At least an effective oral argument will prevent an advocate from losing a case he doesn't deserve to lose.

More realistically perhaps, a good oral argument will enable the advocate, if not to win completely, at least to persuade the court to adopt the scope and tenor of a decision that is in the long run in the best interest of his client: instead of a very broad decision, a very narrow decision or vice versa. A good oral argument also enables the advocate to see what the perceptions of the judges are and to correct any misperceptions. Sometimes judges will read a brief and will all have the same idea, which is very far removed from reality, but the advocate is so close to his brief he doesn't see how this could have been perceived. An oral argument allows him to correct that. Then, too, an oral argument allows an advocate to argue for or against issues which the court, not the parties, have introduced in the case. That is, the court below and all of the parties may be agreed and happy with the assumption that there is jurisdiction. And an appellate judge will ask, "What about jurisdiction? What is the source of jurisdiction?" or "Was this a final order? Was this a timely appeal?" This gives counsel a chance either to say that the question is a misperception or, if it is a real issue, to answer it. If the issue is a difficult one, the court would ordinarily allow a supplemental brief to be filed. So those are five or six functions performed by oral argument.

"My view of this whole subject of judicial activism is that it is overdone as a litmus paper test of judges."

The process of interviewing and selecting law clerks has caused concern among state and federal judges and some have even described it as chaotic. Among other things, the judiciary is competing with the law firms, some of which make their offers two years in advance. Do you have any suggestions for bringing about a more orderly process?

I've lived with this, of course, as have all judges, for a number of years. I have seen the American Association of Law Schools' attempt to deal with the problem by trying to get judges and law schools to agree on certain deadlines before which applications would not be considered, or offers would not be made. But there have always been judges, for their own good reasons, who want to choose very early. Consequently any schedule has never lasted very long.

Judges are being asked to choose a law clerk before the returns are in for the second year. These returns include grades, written work, published work, or clinical activity. We really are being asked to choose a clerk on the basis of what he or she has done that first year. That is ridiculous because two more years of school are yet to take place. I think, therefore, that what will be

See COFFIN p. 6

COFFIN from p. 5

needed—and this may not solve the problem but at least it would be a good college try—is an ad hoc committee of judges (both judges who favor the existing system or lack of one and those who would like to see a more structured consensus), law deans, placement officers, and some former clerks who have gone through this process. This committee would meet and consider the problem and see whether or not it is important enough to have a consensus. If that kind of group, which is broadly representative of all points of view, were to agree on, say, holding back from making offers until a fixed date, I have the feeling it would be very influential with all the federal judges and I suspect state judges, too, would be interested in the results of such an ad hoc investigation. Of course, the result might very well be that people of good will and of good intellect just cannot agree, in which case we will continue as we are doing, but at least we would have made that effort. [See *The Third Branch*, Vol. 14, No. 4, April 1982, p. 6: On motion of Judge Coffin, the Judicial Conference requested the Chief Justice to appoint a small group to consider coordination of the law clerk selection procedure.]

The federal courts of appeals have suffered enormously from heavy caseloads. Do you have any suggestions for meeting this remorseless tide? For example, are there types of cases which might be resolved fairly, but yet be diverted from the courts of appeals?

There are many ideas that are worthy of thought, including alternative methods of dispute resolution, arbitration, mediation, and so on. I don't want to go into the areas that I think have been well plowed by others, but it occurs to me that it might very well be worth a study by the Center or others to see if some cases might be brought to the courts of appeals on a *certiorari* basis: for example, whether a case such as the typical social security case, which has been heard by an administrative law judge, and has then been presented to the board of appeals of the social security agency and then has gone before a district judge and an opinion has resulted, could be reviewed from that point on a *certiorari* basis. That, it seems to me, might very well reduce the load on courts of appeals without adversely affecting individual rights.

"I would like to see administrative law judges so respected that they would be considered increasingly as a last 'court of call' by litigants...."

A case could still be reviewed but not as of right. And there may be other kinds of cases where there have been both agency review and the imprimatur of a district court.

You have recently talked about obsolescent statutes which quite apparently need to be redrafted for clarity or specificity. This gets into the area of the legislative branch of the government, however. Do you perceive a role for the judiciary to assist in bringing these obsolete or unclear statutes to the attention of Congress?

Yes, I do. The judiciary and the legislative branch have systemic problems of communication. Part of these are alleviated through such events as the meetings in Williamsburg between congressional leaders and members of the judiciary. But on a workaday basis there is a need for other devices. There is a mechanism the Center is making available—and if judges would use this mechanism it would be helpful. [See *The Third Branch*, Vol. 14, No. 4, April 1982, p. 4: Center invites opinions noting defects or gaps in statutes.] Judges may write an opinion in which they say a statute is constitutional but they think obviously it is behind the times—it doesn't do what it originally was intended to do and it is a matter that Congress should take a look at. We frequently do say in opinions that this matter is unhappily something for the legislature, but nothing happens at that point. Well, these opinions, and there must be dozens of them, maybe hundreds in the federal system each year, could be collated and the wheat winnowed from the chaff so that the unimportant ones were not sent on to Congress. If they were considered by a committee of the Judicial Conference and then sent to the appropriate committees and officials in the House and the Senate with notations that there was a problem of obsolescence, or a problem of inconsistency with other statutes, or a problem of internal inconsistency, then staffs of congressional committees would be able to include many of these ideas almost as a matter of course in general legislation. Suggestions that are of more major import would attract the interest of individual representatives and senators who are always interested in trying to improve things. This would be a systematic way of communicating without treading upon the independence of the legislative branch or of the judiciary.

In an increasingly shrinking world how will we as a people preserve cherished individual rights? Including those of privacy and economic liberties?

Well, I think between now and the next millenium (it's only eighteen years off), we will be seeing a lot of experimentation. We will have the pressure of population, which will increase somewhat, and it will be a very litigious population. And we are going to care more and more about less and less. Energy will have to be rationed. Material

See COFFIN, p. 7

COFFIN from p. 6

goods are not infinite, space is not infinite, privacy isn't, and people are going to care more and more about these things.

So I see increasing pressures on the courts but I think there ought to be other ways of handling some of these disputes. Some of them would be the alternative dispute resolution methods we have talked about. I hold considerable hope for subsystems like ombudsmen in prisons gaining credibility. I would like to see administrative law judges so respected that they would be considered increasingly as a last "court of call" by litigants, even though they might have a right to appeal beyond.

Probably some increase in the judicial establishment will be necessary but I do not think it would parallel that of population, and, of course, it hasn't to date. The population has increased and litigation has increased exponentially. The judicial system has increased arithmetically but not exponentially. It's not that much bigger than it was twenty or thirty years ago. I think probably it is a good thing.

In the last analysis, it is my hope that over the next twenty years, after this period of great social change and change in attitudes, which started to take place in the sixties and probably is still going on, there will be enough consensus so that litigation of some causes of action will not continue to exhaustion but will be considered reasonably settled and capable of being served by subsystems in the universities, prisons, and labor relations market, and that the judiciary can be used for the litigation that will remain new.

We are almost at the edge of our capacity. The increase that all courts have sustained since the mid-sixties has been enormous. The productivity required to meet this has increased on the part of trial courts and appellate courts, and the number of cases each judge is responsible for has increased so greatly that I can't see very much more progress taking place without really eroding the quality of decisions in the cases.

So, maybe this is a long way of saying that the prospect of protecting rights in the future depends on attitudes: whether the litigiousness can be channelled to other targets than the formal court trial and appellate system, which is very expensive; whether other means can be developed which would merit respect so that they will absorb some of this; and whether perhaps basic problems might be settled. For example, perhaps racial discrimination will be an area about which in twenty years we won't have the litigation that we have now.

The population of law schools went up another 1.7 percent this year. How much do you think the sheer number of lawyers is a stumbling block to success in this area?

I don't think that's a stumbling block. And I don't think we are over-lawyered, but I do think the next twenty years ought to see a fairly basic shift in the nature of the organization of the legal profession to provide services. That is, we know now that the poor are not overly provided with services and we know that the lower half of the middle class is not overly provided with services. Perhaps they even have less access now than they ever had. And to provide them with services would not necessarily result in litigation. That is, preventive law should occupy a greater part of the legal services provided to an adequately lawyered citizenry. What is needed is experimentation and more than that a willingness on the part of lawyers to engage in group practice and, therefore, to be satisfied with far less financial gain than lawyers customarily have in mind today. But that's another subject.

COURTS BUDGET REQUEST BEFORE SENATE PANEL

On May 11, Senator Lowell P. Weicker of Connecticut, Chairman of the Subcommittee on State, Justice, Commerce and the Judiciary of the Senate Committee on Appropriations, chaired hearings on the federal judiciary's budget requests for fiscal year 1983. Chief Judge Charles Clark, accompanied by A.O. Director William E. Foley, testified on behalf of the circuit, district, and bankruptcy courts' request for $771,125,000. The request was actually smaller than it had been three months earlier before the corresponding subcommittee of the House appropriations committee (see *The Third Branch*, March 1982, p. 1). This reduction, from $777,600,000, was based on adjustments in the predicted rate of inflation, updating of probation caseload projections, and other reasons.

The hearings took place in a historic part of the Capitol—ironically, in quarters used (in the mid-nineteenth century) as part of the Clerk of the Supreme Court's suite and by the court library.

POSITION AVAILABLE

Position: Clerk, Bankruptcy Court for the District of South Carolina. Starting salary is $28,245 to $39,689, depending on experience and qualifications.

Responsibilities: A high-level management position, which functions under the direction of the Bankruptcy Judge, the Clerk of Court is responsible for managing the administrative activities of the clerk's office, and overseeing the performance of the statutory duties of that office.

Qualifications: Law degree from an accredited law school, and minimum of ten years of progressively responsible administrative experience in public service or business, which provides a thorough understanding of organizational, procedural, and human aspects of managing an organization.

To Apply: Submit resume to R. Geoffrey Levy, P.O. Box 1448, Columbia, SC, 29202, no later than July 1, 1982.

EQUAL OPPORTUNITY EMPLOYER

PERSONNEL

NOMINATION

John P. Moore, U.S. District Judge, D. CO, May 18

APPOINTMENTS

Carol Los Mansmann, U.S. District Judge, W.D. PA, April 8
Glenn E. Mencer, U.S. District Judge, W.D. PA, April 16
William W. Caldwell, U.S. District Judge, M.D. PA, April 27
Michael A. Telesca, U.S. District Judge, W.D. NY, May 3
John A. Nordberg, U.S. District Judge, N.D. IL, May 6
William T. Hart, U.S. District Judge, N.D. IL, May 7
Robert E. Coyle, U.S. District Judge, E.D. CA., May 13
Walter E. Black, Jr., U.S. District Judge, D. MD, May 17

ELEVATIONS

Alfred L. Luongo, Chief Judge, E.D. PA, May 21
J. Waldo Ackerman, Chief Judge, D. NJ, May 27
Constance B. Motley, Chief Judge, S.D. NY, May 31

SENIOR STATUS

J. Smith Henley, U.S. Circuit Judge, CA-8, May 31
Roger Robb, U.S. Circuit Judge, CA-DC, May 31
Lloyd F. MacMahon, Chief Judge, S.D. NY, May 31

DEATH

Robert A. Sprecher, U.S. Circuit Judge, CA-7, May 17

CHIEF PROBATION OFFICER
W.D. PA.

Position: Chief Probation Officer, U.S. District Court for the Western District of Pennsylvania. The officer is responsible, in accordance with the applicable provisions of 18 U.S.C. §§ 3654-3655 and Chapter 207 of Title 18, to the district court, the Judicial Conference of the U.S., the Administrative Office of the U.S. Courts and the U.S. Parole Commission for the probation, pretrial services, and parole programs in the judicial district. Salary $33,586 to $57,500.

Qualifications: For JSP-13: Four-year degree in one or more of the social sciences appropriate to the position to be filled. Advanced degree preferred. Three years of current experience in personnel work for the welfare of others with at least one year of this experience in a correctional setting at the level of a probation officer in the Federal Probation System or the equivalent. For JSP-14: As above, but with four years experience, with at least one year at the level of a supervising probation officer or chief probation officer, JSP-13, or the equivalent. For JSP-15: As above, but with one year of experience as a deputy chief or chief probation officer, JSP-14 level, or the equivalent.

To Apply: Employees within the Federal Probation System should send a resume, others an SF-171, to Judge Maurice B. Cohill, Courtroom No. 3, 8th floor, U.S. Post Office and Courthouse, Pittsburgh, PA 15219. Starting date is October 1, 1982. Position closes July 15, 1982.

EQUAL OPPORTUNITY EMPLOYER

ao/fjc calendar

June 13-25 Trial Practice Institute for Assistant Federal Defenders
June 14-15 Judicial Conference Subcommittee on Supporting Personnel
June 17-18 Judicial Conference Advisory Committee on Criminal Rules
June 18 Judicial Conference Committee on Administration of the Bankruptcy System
June 21-22 Judicial Conference Committee on Rules of Practice and Procedure
June 21-24 Juror Utilization and Management Workshop
June 22-25 Judicial Conference Committee to Implement the Criminal Justice Act
June 24-25 Judicial Conference Advisory Committee on Bankruptcy Rules
June 28-29 Judicial Conference Committee on the Administration of the Federal Magistrates System
June 28-July 1 Judicial Conference Committee on the Administration of the Probation System

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CRIMINAL CODE CHANCES ARE DIM IN THIS CONGRESS, LAXALT SAYS

Senator Paul Laxalt (R-Nev) is widely considered to be one of President Reagan's oldest political allies and friend-confidants. Senator Laxalt's arrival in Washington predated that of Ronald Reagan by six years, and Laxalt is now serving his second term in the Senate. There he is a member of the Judiciary Committee (and chairman of its Subcommittee on Regulatory Reform) and of the Appropriations Committee and various of its subcommittees (and chairman of its Subcommittee on Military Construction).

Laxalt served during World War II with the U.S. Army Medical Corps in the South Pacific, and later was graduated from the University of Denver and its law school. A district attorney before he became thirty years old, Laxalt rose through the ranks of state elective offices, to become governor of Nevada in 1966. He was in private practice at various times in his career.

* * *

A recent newspaper article quoted Senate Judiciary Committee Chairman Strom Thurmond as saying that passage of the bill pending in the Senate to codify and revise all federal criminal law will not be realized this session because "too many members of Congress don't want to face these hot issues this year." Do you agree?

Yes, I agree. Many senators who have supported the concept of recodification in the past did not want to process the bill on the floor of the Senate this late in the 97th Congress. It is understandable in this election year, especially when the prospects for the code in the House are dim, that controversial issues such as gun control, death penalty, and labor extortion make some senators shy away. It is unfortunate that almost forty states have modernized their criminal law and the Congress has yet to take any action.

Are there any provisions of the proposed federal criminal code that give you concern?

The criminal code, which was favorably reported by the Senate Committee on the Judiciary, represents a balanced bipartisan consensus, which I support. From this senator's perspective, S. 1630 is a much better bill than S. 1722, which passed the Senate in January of 1978. Although I fully support the bill as reported, there are three sections which I feel must not be compromised. First, the sentencing provisions providing for the abolition of the Parole Commission, determinant sentencing, and government appeal if a sentence is too lenient. Second, the bail provisions which allow the judge to take into consideration the possible danger to the community before releasing someone prior to trial. Finally, the many sections of the code which

See LAXALT, p. 3

KING COMMITTEE TRACKS PILOT COURTS' PROGRESS

Representatives of pilot courts participating in the work of the Judicial Conference's Implementation Committee on Admission of Attorneys to Federal Practice held a seminar in Kansas City, Missouri, in April. This seminar provided a forum for the judges, lawyers, and law professors from the fourteen participating district courts to share experiences, discuss progress, and establish further interaction and communication. Only two and one-half years after its establishment, the Committee, chaired by Judge Lawrence King (S.D. FL) observed that eight of the fourteen pilot courts have operational programs for the admission of attorneys to federal practice. In addition, most of the other six courts have rules ready for adoption.

The Judicial Conference at its September 1979 meeting created the King Committee to implement and evaluate the major recommendations of the Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts, known as the Devitt Committee. These recommendations included the adoption of examinations to test knowledge needed for practice in federal courts, a trial experience requirement, a peer review procedure, and a law student practice provision. The King Committee's task is to monitor these federal practice requirements in a

See KING COMMITTEE, p. 5

Ju 10. 3/2:

FOURTH CIRCUIT ANNUAL REPORT NOTES INCREASES IN FILINGS AND TERMINATIONS

The Fourth Circuit's third annual report, collecting and analyzing data for the circuit's operations during 1981, has recently been released.

Courts of the Fourth Circuit in 1981 experienced a marked slowdown in the rate of increase of overall civil filings, a 1.9 percent increase over 1980, compared to an 18.5 percent increase in total civil filings in 1980 over 1979 totals. The lower increase is the result of a decline, for the first time since 1978, in state prisoner petitions. Even with this 7.9 percent reduction, down to 790 in 1981 from 858 in 1980, the Fourth Circuit still leads all circuits in the number of state prisoner petitions. Prisoner filings there represent a fourth of all such petitions filed in the U.S. courts and 35.2 percent of the Fourth Circuit's total filing activity. In spite of the overall circuit decline in prisoner petitions, the Eastern District of Virginia witnessed a 17.9 percent increase in prisoner filings, the largest increase in any U.S. district court. This figure contributed significantly to the Eastern District's overall 13.2 percent increase in 1981 over 1980 civil filings.

Among other comparative data highlighted in the 80-page report are the following:

- Although the district courts of the circuit saw a 7.5 percent increase in total filings, more cases were terminated in 1981 than were filed, resulting in a decline in total cases pending, the first decline since 1973.
- In statistical 1981, the first full year of operation under the revised bankruptcy code, 14,000 more estates, or 39,778 cases, were filed in Fourth Circuit bankruptcy courts than in the previous year, which recorded 25,778. This 54.3 percent increase in filings was almost precisely matched by an increase of 54.6 percent in the number of bankruptcy cases closed during 1981, compared to 1980. Even with the record number of terminations, the total number of bankruptcy cases pending also is 56 percent higher than the previous year, rising from 39,778 in 1980 to 54,012 in 1981. The District of Maryland and the Eastern District of Virginia accounted for 41 percent of all estates filed in the circuit.

NEW EDITION OF MANUAL FOR COMPLEX LITIGATION

The fifth edition of the *Manual for Complex Litigation* with amendments to September 1, 1981, has been prepared under the auspices of the Federal Judicial Center and published by various commercial publishing houses. The manual, originally entitled the *Outline of Suggested Procedures and Materials for Pretrial and Trial of Complex and Multidistrict Litigation,* was initially prepared in 1967 by the Subcommittee of the Judicial Conference of the United States Coordinating Committee for Multidistrict Litigation.

This edition of the manual updates prior manuals to reflect changes in the law and new cases, and to incorporate minor changes in procedure. The manual was prepared by the then Board of Editors of the Manual consisting of Senior Judges William H. Becker, Chairman; Joe Ewing Estes; Edwin A. Robson; and Hubert L. Will; Chief Judge Sam C. Pointer, Jr.; and Judge William C. Connor.

(There have been several changes in the board since the publication of this edition. Chief Judge Pointer is now Chairman, Judge Estes is no longer on the board, and Judge Edward R. Becker (3rd Cir.), Judge Alvin B. Rubin (5th Cir.), and Judge Milton Pollack (S.D. NY) are now members of the board.)

REPORT ON PROBATION CLASSIFICATION READY

The final version of *A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads,* by James B. Eaglin and Patricia A. Lombard, has been released by the Center.

At the request of the Judicial Conference Committee on the Administration of the Probation System, the Center, with the cooperation and assistance of the A.O.'s Probation Division, undertook an evaluation of various predictive models used by probation officers for risk classification of their clients. The results of this research and its ensuing recommendations were transmitted in draft form to the committee, which approved the recommendations and reported its action to the Judicial Conference in 1980.

Before implementing the study's major recommendation for nationwide adoption of the U.S.D.C. 75 risk prediction model, the model was field tested in five locations, then modified in accordance with field test findings, and renamed the Risk Prediction Scale 80 (RPS 80). The RPS 80 then became the primary method for classifying federal probationers.

Copies of the study are being distributed to U.S. Probation Officers. Other requests for the study should be directed, with a gummed, self-addressed mailing label, to the Center's Information Service, 1520 H Street, N.W., Washington, D.C. 20005.

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"MINI-SEMINARS" HELD

Newly appointed district judges often must wait up to a year to attend the Center's week-long orientation seminar in Washington, because the Center does not schedule the long seminars until there are about thirty new appointees. To help these judges in the period prior to the seminar, the Center began several months ago to hold "mini-seminars," or video orientation programs, for small groups of judges in various locations around the country.

Since the first mini-seminar in Kansas City, Missouri, in October 1981, six other seminars have been conducted for new district judges: in New York City, Norfolk, San Antonio, Chicago, and Washington.

At the two- or three-day small seminars, selected video tapes of the presentations made to the larger seminars are shown to groups of three to five new judges, under the tutelage of one of several judges with long and wide experience on the bench. Those judges act as mentors and advisors during the programs, supplement the instruction provided by the tapes, and respond to questions arising during videotape playbacks. The informality of the seminars stimulates spontaneity in questions.

Responses to the new seminars have been highly favorable. In addition, as a result of participants' comments and indications of interest, the week-long judges' seminar program has been changed to include new topics as well as a more sophisticated approach to some already-included topics.

Because videotapes substitute for faculty, and because these programs are held on a regional basis, the relative cost to the Center is low.

In addition, of course, new judges continue to participate in the Center's ongoing in-court training program, under the direction of experienced judges in their local courts.

LAXALT from p. 1

would enhance the role of the victim in the criminal justice process. One requires that a victim impact statement be included in all presentence reports. Another strengthens our victim-witness intimidation statutes, while others require restitution and provide for victim compensation.

There are over thirty bills pending in Congress aimed at limiting the jurisdiction of the federal courts, some touching on those areas of the law where the federal courts have heard and decided cases since the Judiciary Act of 1789. A related issue is Attorney General William French Smith's charge that the federal judges are practicing "judicial activism." Would you comment on these subjects, please?

It goes without saying that the jurisdiction of the federal courts has increased significantly. Some of the blame must be placed with the Congress which has enacted over seventy statutes in the past decade enlarging the jurisdiction of federal courts. However, many federal courts and the Supreme Court have tended to give expansive, rather than restricted, interpretation to these statutes. The bills currently pending in Congress reflect a political reality that some believe the pendulum has swung too far on the side of federal jurisdiction. This has a negative effect on the relationship between federal and state courts and concerns many of us who support a strong and vital state court system.

Both Senator Thurmond and Senator Heflin have introduced bills which would create commissions to study the jurisdiction of the state and federal courts and to report to the President and Congress on possible revisions to the Constitution and the laws it deems advisable on the basis of such study. I support this approach.

Though several attempts have been made to abolish diversity jurisdiction in the federal courts, legislation to bring this about inevitably fails. Is the climate in Congress changing any on this issue?

See LAXALT, p. 4

LAXALT from p. 3

In the past, the abolition of diversity jurisdiction has been supported by state chief justices, presidents, and attorneys general. It is opposed primarily by litigating attorneys who feel that they get more justice in a seemingly more neutral federal forum. As the caseload of the federal courts increases, there will be more pressure to arrive at a solution that doesn't just call for more judges.

The estimated 39,000 diversity cases in the federal system add significantly to the burden already on the federal courts. Transferring these cases to the state judges would increase their caseload less than one percent. This seems to be an excellent solution even though it would deny many members of the bar one of their cherished options—choice of forum.

Other arguments against its abolition are:

The need for uniform law; potential bias against outside litigant; and state judges are more political because most are not appointed for life.

You have been a strong proponent for states' rights and you have definite ideas about federalism. Are there some areas where you feel state regulations should control, rather than federal regulatory agencies—such as in the area of social welfare, Title VII cases, and OSHA?

As you may know, I am currently chairing the President's Advisory Committee on Federalism. This committee has been given a broad mandate to take a hard look at the federal system and the respective roles of the federal, state, and local levels of government. I feel strongly that as we begin the task of revitalizing our federal system, that no program, policy, or regulatory authority is exempt from at least being reviewed for its decentralization possibilities. Obviously, there are some programs, such as social security and defense, which are clearly federal responsibilities. Nonetheless, decentralization, wherever possible, is our goal.

The present administration has voiced its opposition to the statute on the books now which calls for investigation and the appointment of a special prosecutor when the Attorney General has specific information about possible improprieties by a high government official. Would you vote for the proposed changes?

Yes, I would. The Ethics in Government Act, signed into law by President Carter, sets such a low statutory threshold for the mandatory appointment of a special prosecutor that, in most cases, the public official is merely harassed. In 1980, I wrote to the then Attorney General Civiletti about these concerns because of the allegations regarding Hamilton Jordan. I felt at the time, and feel now, that our criminal justice system with its investigations, grand juries, and prosecutors can enforce our laws.

As you know, Jordan was not prosecuted because there was insufficient evidence. However, press reports indicate that his defense costs exceeded many times his government salary. This is investigatory overkill. The public wants and should demand honest public servants, but we must not establish prosecutorial thresholds which vary depending on your employer. We must all be treated equally and fairly under the law.

In March the Senate unanimously passed the Regulatory Reform Act of 1982 (S. 1080). This includes a new version of Senator Bumpers' proposals to strengthen standards of judicial review in the federal courts. Do you feel that under present procedures the federal courts need stricter guidelines on how to handle administrative agency review?

The Bumpers amendment is part of the general package of S. 1080 and should not be viewed in isolation. S. 1080 generally tries to improve the federal regulatory process by giving agencies more specific direction regarding the procedures they should be following and the general goals they should try to achieve. The Bumpers amendment modifies the standards of judicial review so the courts will provide a more effective oversight of agencies following this more precise mandate.

When the A.P.A. was originally enacted, most rulemaking was not expected to involve complex issues of fact. With the rise of social regulation (such as environmental regs, worker safety regs, et cetera) most significant rulemakings focus on complex technical and factual issues. To deal with this new development, the Bumpers amendment established new guidelines for courts in handling these factual questions of rulemaking: courts are to determine whether the factual basis of a rule is supported by substantial evidence.

Regarding judicial review of an agency's interpretation of its legal mandate, some courts had developed a doctrine that an agency's interpretation of law is presumed to be correct. This not only gives agencies an unfair advantage, but abandons the traditional role of the courts as interpreters of the law. The Bumpers amendment clears up this issue by prohibiting a court from presuming an agency's legal interpretation is correct, but allowing it to consider special cases where the Congress has given an agency broad discretion.

There were some tense hours in the Third Branch of government at the end of March, when, as current funding was about to expire, there was no appropria-

See LAXALT, p. 5

KING COMMITTEE from p. 1

selected number of district courts that indicated a desire to cooperate in adopting any or all of these requirements. The pilot districts were identified in April 1980 and progress since that time has been substantial.

The accompanying chart identifies the types of admission requirements presently contemplated for implementation in the fourteen pilot courts. The table contains the four primary requirements as well as a listing for CLE/Trial Advocacy Programs in recognition of the Judicial Conference recommendation that the courts "support continuing legal education programs on trial advocacy and federal practice subjects and encourage participating lawyers to attend." (See *The Third Branch*, December 1981, for a more complete discussion of CLE programs in various courts.)

KING COMMITTEE PILOT COURTS

Court	Examination	Trial Experience	Peer Review	Student Practice	CLE/Trial Advocacy Program
C.D. Cal.	✓	✓	✓	✓	✓
N.D. Cal.			✓	✓	✓
N.D. Fla.	✓	✓	✓	✓	
S.D. Fla.	✓	✓	✓	✓	
N.D. Ill.		✓	✓	✓*	✓*
S.D. Iowa	✓		✓	✓	✓
Md.		✓	✓	✓*	✓*
Mass.	✓	✓			
E.D. Mich.			✓	✓*	✓*
W.D. Mich.	✓		✓	✓	✓
W.D. Pa.		✓			✓*
P.R.	✓	✓			✓*
R.I.	✓				✓
W.D. Tex.	✓*		✓*		
Total	9	8	10	8	10

*Adopted prior to pilot program.

This chart represents admissions requirements either contemplated or implemented at the present time. In the case of contemplated requirements, of course, changes may occur prior to the adoption of rules implementing such requirements.

The Federal Judicial Center has been active in monitoring the efforts in the courts and in serving as a clearinghouse for information on the various programs.

Some of the programs in operation are as follows: The District of Rhode Island has twice administered its instructional course and examination. The Northern and Southern Districts of Florida, the District of Puerto Rico, and the Southern District of Iowa have also given examinations. The Western District of Texas has long had an examination requirement. The peer counseling/professional assistance committees in the Northern District of California and the Eastern District of Michigan are presently accepting referrals. Such a committee has also been established in the Southern District of Iowa. The Western District of Michigan has conducted a trial advocacy workshop. Other pilot courts are continuing to plan, adopt, or implement their programs.

The King Committee will next meet on July 15 and 16.

LAXALT from p. 4

tion nor continuing resolution for the federal judicial system. Some hasty meetings were held to take emergency measures to assure that the courts would remain open. As a member of both the Judiciary Committee and the Appropriations Committee, do you have some thoughts on how this might be averted in the future?

No. There is no good reason why the appropriations to the Third Branch of government should be treated differently by the politically charged budget and appropriations process.

You are the primary cosponsor of antitrust legislation which calls for contribution and claim reduction in private litigation under antitrust law. Would you explain this legislation to our readers?

Due to joint and several liability, class action suits, and novel plaintiff settlement strategies, it is possible for a corporation to be liable for enormous damages. This bill would allow corporations to exercise their right to a trial on the merits without having to put their corporation on the auction block. Damages would be limited to the damages the corporation caused by its sales, trebled, along with interest and attorneys' fees. Then, the antitrust laws could not be used for an anti-competitive effect by those who settle early, shifting their liability to other members of the class of defendants.

I also support the Thurmond compromise which would allow the bill to apply to pending cases if the court determines it would not be inequitable to do so.

Deaf attorney makes history in Supreme Court case

COMPUTER-AIDED TRANSCRIPTION EQUIPMENT BENEFITS DEAF AND HEARING-IMPAIRED PARTIES

Michael Chatoff argued his first case before the Supreme Court on March 23, representing a ten-year-old deaf appellee. His client, Amy Rowley, was putting the Education for All Handicapped Children Act to its first test since its passage in 1975, contending that the Hendrick Hudson School District in Westchester County, New York, was in violation of the act by refusing to provide her with a sign-language interpreter in her classroom. Chatoff, 35, had had only one previous court case, in which he had represented himself. The young attorney made history by his Supreme Court appearance, but not for any of the foregoing reasons. Michael Chatoff is deaf, too, and his representation of his client was conducted with the aid of advanced computer-aided transcription equipment. A court reporter coded testimony on a stenographic machine that fed by wire into a computer capable of translating testimony almost instantaneously into "readable" English, which, by cable, could be viewed on a screen (looking much like a TV receiver or computer terminal) about three seconds after coding in the courtroom.

For "real-time" (within seconds) transcribing for the *Rowley* case, veteran reporter Joseph R. Karlovits of Pittsburgh used commercially developed software and terminals that have the capability to provide textual display of voice almost as rapidly as it is spoken. The catalyst for the historic occasion was Dr. Donald Toor of Gallaudet College for the Deaf in Washington, D.C. Toor is an expert in technological equipment for the hearing-impaired, and was the one to whom Gallaudet's president had referred Chatoff's request for help with his high court appearance. Chatoff, like many deaf persons whose deafness arose during adulthood, had an imprecise knowledge of signing and lip-reading. He claimed he had understood no more than 50 to 55 percent of district and appellate court proceedings of the *Rowley* case. In those courts he had had the aid of speed note-takers, who presented him with written versions of questions posed in court. (The Supreme Court held against Amy Rowley, ultimately.)

On the same day that the *Rowley* case was heard in the Supreme Court, a deaf plaintiff presented a case in Will County Circuit Court, Joliet, Illinois, contending that her deafness was the result of medical malpractice, *Angela Callan* v. *James J. Nordland.* The reporter in that case, Edward Fulesday, also used "instantaneous" translation equipment. There, the plaintiff won, with an award of $265,000.

A few weeks earlier, in a San Diego, California, case which received much media notice, defendant Michael Hernandez Contreras was tried in Los Angeles Superior Court on two counts of murder I and two counts of possession of a deadly weapon. An earlier conviction of Contreras on another murder charge had been overturned, the appellate judge holding that Contreras had not been "legally present" at his trial since he was not able to follow the proceedings and participate in his own defense. When Los Angeles Presiding Judge David N. Eagleson heard projections that *People* v. *Contreras* would take fourteen to sixteen weeks, he asked his court administrator to find a faster method of transcribing the trial than a speed typist. An instantaneous computer transcription system was brought in as well as court reporter Jere With. The trial lasted from January 25 to March 4, and, this time, the defendant was found guilty of murder II on one charge, not guilty on the other, and guilty on both charges of possession of a dangerous weapon.

Both the system used in Washington and Joliet and the different system used in Los Angeles also allow for nearly instantaneous printouts in English. Many computer translations are phonetic, but the reporter and his staff are able to edit these, using the system's word processing component, for presentation in perfect English within hours of the court proceeding.

Following the trial by watching in-court terminals proved useful for trial participants other than the deaf party; the instantaneous transcriptions enabled others to understand the deaf party's responses to questions.

Between ten and fifteen deaf lawyers are in practice nationwide, claims a spokesman for the National Center for Law and the Deaf. The Center also estimates that there are approximately two million deaf persons in the U.S. and another sixteen million who are hearing-impaired. In addition, many court reporters and courts have purchased instantaneous CAT systems for applications other than in connection with deaf courtroom participants.

A former official court reporter in the U.S. courts for over thirty-six years, and now executive director of the United States Court Reporters Association, Samuel M. Blumberg, Jr., says, "The greatest opportunities for court reporters to be of great service and assistance to the court system and to litigants are just beginning with the newly available instantaneous translation of machine shorthand notes." Blumberg adds that he regrets that, as a shorthand writer he did not use stenotype, and so "will not be able to participate in this latest technological advance."

PRISON POPULATION STATISTICS CONFLICT

Apparently conflicting reports, containing widely varying statistics on increases in the number of individuals incarcerated in U.S. prisons, recently appeared in the press and on television.

Many major news media reported on May 3 that the nation's prison population had grown by "a record 12.1 percent" in 1981 over the previous year and that during that period the number of federal prisoners had increased by 16 percent. The media were accurately reporting data that had been released on May 2 by the Bureau of Justice Statistics, an agency of the Department of Justice. The Department of Justice also had announced in its publication *Prisoners in 1981* that the total number of federal inmates at the end of 1981 was 28,133, a rise of 3,800 over the 1980 federal prison population.

Another agency of the Department of Justice, the Bureau of Prisons, which counts prisoners differently, reported, in contrast, that the federal prison population, as of March 31, 1982, was 24,564, representing an increase of a little more than 4 percent over the 23,569 federal prisoners tallied on December 31, 1981, for the final quarter of last year. The 995 population increase, said a Bureau of Prisons' spokesperson, is consistent with "a slight but steady increase" observed in recent months.

The discrepancy in numbers is partly explained by the fact that the Bureau of Prisons counts, in general, only sentenced persons for its quarterly reports. On the other hand, Bureau of Justice Statistics surveys include over 2100 Haitians and Cubans detained in federal institutions by the Immigration and Naturalization Service. While Bureau of Justice Statistics omit nearly one thousand state prisoners who are boarded in federal institutions, the Bureau of Prisons totals do include these inmates. In addition, Bureau of Justice Statistics totals include persons released to half-way houses or contract facilities, while Bureau of Prisons statisticians do not tally these individuals. In addition, Bureau of Justice Statistics figures account for unsentenced U.S. marshals' detainees awaiting trial in federal institutions.

THREE JUDGES ASSIGNED TO RAIL REORGANIZATION COURT

On May 20 three additional federal judges were assigned to the Rail Reorganization Court. The court, created by the Rail Reorganization Act of 1973 (45 U.S.C. §719), functions primarily to determine the value of properties transferred by seven principal bankrupt railroads and other transferors in the Northeast and Midwest.

The three new judges are Oliver Gasch and William B. Bryant, Senior U.S. District Judges of the District of Columbia, and Charles R. Weiner, U.S. District Judge of the Eastern District of Pennsylvania. They join three other senior judges, Presiding Judge Henry J. Friendly (CA-2) and Judges John Minor Wisdom (CA-5) and Roszel C. Thomsen (D.MD).

The newly expanded court immediately adopted revised rules that provide for the establishment of two separate panels. The general panel, with Presiding Judge Friendly and Judges Wisdom and Thomsen will, among other things, retain jurisdiction over the valuation of the rail property of the northeast railroads transferred to Conrail, states, and profitable railroads. The new judges will exercise jurisdiction over cases arising under the provisions of the Northeast Rail Service Act of 1981. Judge Gasch will preside over this panel.

ASPEN INSTITUTE PLANS SEMINARS FOR JUDGES ON HUMAN RIGHTS

The Aspen Institute for Humanistic Studies, in cooperation with the Lawyers Committee for International Human Rights in New York City, is planning a series of human rights seminars for small groups of federal circuit and district judges. The purpose of the seminars, according to Alice H. Henkin, the Institute's Coordinator of Justice Activities, is "to familiarize the judiciary with the international instruments and institutions for the protection of international human rights at a time of increasing interest in the domestic legal application of international human rights standards."

One seminar was held last March for twenty judges of the First, Second, Third, Fourth, and D.C. Circuits, and a second is planned for late fall for judges of the Sixth, Seventh, and Eighth Circuits. Two others are in the planning stages.

Although the seminars will be by invitation only, interested judges may write to Mrs. Henkin at the Aspen Institute, 717 Fifth Avenue, New York, NY 10022.

POSITION AVAILABLE

Position: Office of the Clerk, U.S. Bankruptcy Court for the Eastern District of Tennessee. Under the direction of the judges of the court, the clerk has administrative responsibilities for all aspects of the clerk's office, including the supervision of divisional offices.

Qualifications: A minimum of ten years of progressively responsible administrative experience is required in either public service or private business, three of which years must have been in a position of substantial management responsibility. Under certain conditions, college degrees and other educational attainments may be substituted for some experience qualifications.

To Apply: Interested parties should apply immediately by sending duplicate resumes to: U.S. Bankruptcy Judge Clive W. Bare, Suite 1501, United American Plaza Building, Knoxville, Tennessee 37929; and U.S. Bankruptcy Judge Ralph H. Kelley, P.O. Box 1189, Chattanooga, Tennessee 37401. Position is now vacant.

EQUAL OPPORTUNITY EMPLOYER

ao & fjc calendar

July 1-3 Fourth Circuit Judicial Conference
July 6-7 Judicial Conference Committee on Codes of Conduct
July 7-9 Advanced Seminar for Full-time Magistrates
July 7-9 Judicial Conference Committee on Judicial Ethics
July 7-10 Tenth Circuit Judicial Conference
July 8-9 Judicial Conference Committee on the Judicial Branch
July 12-13 Judicial Conference Committee on Court Administration
July 12-13 Judicial Conference Committee on Intercircuit Assignments
July 12-13 Judicial Conference Committee on Administration of the Criminal Law
July 13-15 Workshop for Judges of the Sixth Circuit
July 15-16 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice
July 15-18 Sixth Circuit Judicial Conference
July 19-22 Juror Utilization and Management Workshop
July 21-23 Workshop for Newly Appointed Training Coordinators
July 25-28 Eighth Circuit Judicial Conference
July 27-31 Ninth Circuit Judicial Conference

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PERSONNEL

NOMINATIONS

Thomas P. Jackson, U.S. District Judge, D. DC, May 24
Henry A. Mentz, Jr., U.S. District Judge, E.D. LA, June 8
Jaime Pieras, Jr., U.S. District Judge, D. PR, June 8

CONFIRMATIONS

George C. Pratt, U.S. Circuit Judge, CA-2, June 18
Maurice M. Paul, U.S. District Judge, N.D. FL, June 18
John W. Potter, U.S. District Judge, N.D. OH, June 18
Harold M. Fong, U.S. District Judge, D. HI, June 18
A.J. McNamara, U.S. District Judge, E.D. LA, June 18

ELEVATION

Charles H. Haden II, Chief Judge, S.D. WV, May 13

SENIOR STATUS

Edward R. Neaher, U.S. District Judge, E.D. NY, May 28
Robert D. Morgan, U.S. District Judge, C.D. IL, May 28

CORRECTION: ELEVATION

J. Waldo Ackerman, Chief Judge, C.D. IL, May 27

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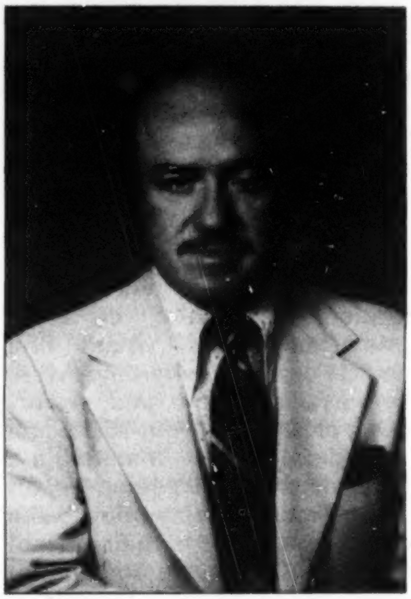
DEPOSITORY 376

CHIEF JUDGE URBOM ELECTED TO BOARD OF F.J.C.

Chief Judge Warren K. Urbom of the District of Nebraska has been elected to the Board of the Federal Judicial Center for a four-year term. He replaces Judge Aubrey E. Robinson, whose term expired and who was not eligible for reelection.

Judge Urbom, who was born in Atlanta, Nebraska, on December 17, 1925, received an A.B. from Nebraska Wesleyan University and a J.D. from The University of Michigan Law School. He is married and the father of four children.

He was appointed to the federal bench in 1970, and he became Chief Judge in 1972. Judge Urbom is currently serving on the Judicial Conference Subcommittee on Federal Jurisdiction.



Chief Judge Warren K. Urbom

AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION FORMED

A new Institute of Judicial Administration has been formed in Australia. Australia now joins the small group of nations (which includes the U.S., Great Britain, and Canada) in having a private, independent institution for the promotion of improvements in the administration of justice. The institute is to be governed by a council with representatives from each state and the Australian Capital Territory and also from a broad range of specialties in the legal profession: justices from federal courts and state courts; practitioners, including private and government lawyers; and academic lawyers. Membership, by $25 subscription, is open to all members of the profession in Australia and Papua New Guinea. The institute, an association incorporated with limited liability, anticipates raising sufficient funds for operating costs through its subscriptions and donations. Foundation donations and other gifts will support research projects.

Primary among the institute's goals is the introduction of efficient management and organizational practices into Australian courts. Empirical research will be

See INSTITUTE, p. 6

RULES AMENDMENTS ANNOUNCED

The Supreme Court has issued amendments to the Federal Rules of Civil Procedure and Criminal Procedure and to the rules governing proceedings in the United States district courts under Sections 2254 and 2255 of Title 28 of the United States Code. Most of the amendments are technical in nature.

One exception, however, is an amendment to Rule 20(b) of the Federal Rules of Criminal Procedure. That rule permits a defendant to waive trial in the district in which the complaint against him is pending and transfer the cause for a plea of guilty or nolo contendere and for sentencing to the district in which he was arrested. The amendment to this rule provides that a defendant who is arrested in another district may, by waiving venue as well as trial, make it possible for charges to be filed in the district of his arrest. The amendment was occasioned by the delay caused under the old rule by the transmittal of defendant's statement consenting to the transfer of his trial to the district where the complaint was pending, the filing of an information or return of an indictment there, and the transmittal of papers in the case from that district to the district where the defendant is present. No change was made in the requirement that any transfer occur with the consent of both United States Attorneys.

The other amendments to the

See RULES, p. 6

JU 10. 3/2.

JUSTICES SELECT LAW CLERKS

Thirty-four young lawyers have been selected to be 1982-83 law clerks by the nine Justices of the Supreme Court and one retired Justice. Although congressional authorizations permit each active Justice to hire up to four clerks, and seven Justices have selected that many, Justice Rehnquist and Justice Stevens, following their usual practices, have chosen three and two law clerks, respectively. Retired Justice Stewart, who continues to serve on the U.S. courts of appeals, has a permanent office at the Court and has selected one clerk.

Of the thirty-four newly chosen clerks, nine are graduates of Harvard Law, and four are from Yale. Three each are from the University of Michigan, Stanford, and the University of Virginia, two each are from the University of Chicago, Columbia, and Georgetown, and one each is a law graduate of Duke, Tulane, and the University of Missouri.

Until one hundred years ago, Supreme Court Justices did not have law clerks. Then, in 1882, when Horace Gray was appointed to the high court, he brought with him a legal assistant. Gray personally paid his assistant's salary. According to Barrett McGurn, former Supreme Court Public Information Officer, Justice Gray was continuing in Washington a practice he had begun during his tenure as Chief Justice of the Supreme Judicial Court of Massachusetts, by hiring a young honor graduate from Harvard Law School. The advantages in such an arrangement were quickly observed by the other Justices, who soon followed suit. In 1885 Attorney General W. H. Garland requested that Congress authorize assistants for the justices, and asked for annual stipends of $1600. (Today the clerks earn nearly eighteen times that sum.) Congress acceded, and until 1947, each Justice was allowed a single assistant. From 1947 to 1970, each Justice was authorized two, and in 1970 the number grew to three. Now, the justices may hire four, if they wish.

Early on, the position was called "stenographic clerk" by Attorney General Garland. Later, it was variously referred to as secretary, law assistant, research aide, legal assistant, and briefing attorney. The term "law clerk" did not come into use until 1919, when Justice Holmes began using it to refer to his own assistant.

For an interesting short history of the law clerk corps, see McGurn's article, "Law Clerks—A Professional Elite" in the *1980 Yearbook of the Supreme Court Historical Society.*

FEDERAL PRISONER PROFILE

The population of federal prisons is composed largely of young (under 35), white, currently unmarried males, whose first arrests occurred when they were between fourteen and twenty years old. All but about 15 percent of federal prison inmates are recidivists, and 56 percent report five or more arrests prior to the one that resulted in their current sentence. These are among statistics released May 1, 1982, from quarterly data compiled on all Federal Prison System inmates as of March 31, 1982, which exclude detentioners.

At the end of the year's first quarter, the survey revealed the total number of prisoners at the forty-three institutions operated by the Bureau of Prisons as 24,564, a number which omits over 2,100 Cuban and Haitian refugees detained in federal institutions by the Immigration and Naturalization Service.

The profile of sentenced federal inmates shows that about a quarter of them are serving sentences for drug law violations, and another one-fifth had been convicted of robbery and crimes associated with robbery of institutions protected by federal laws, mainly banks.

(The most recently available Department of Justice statistics on state prisoners, compiled from a 1979 inmate census, are in sharp contrast to the new figures for federal inmates serving time for drug offenses. In 1979, only 7 percent of inmates were in prison for drug convictions, down from 10 percent in 1974. The decline in drug offenders was attributed to heightened prosecutorial attention to violent crimes).

Blacks, who compose 12 percent of the general population, rank disproportionately high in the federal prison population, composing 34.5 percent of prisoners. This figure, however, is significantly lower than the comparable 48 percent black population in state prisons shown in the 1979 state prison census. Of even greater significance than racial population figures are disparities in ethnicity. Hispanics, who compose about 5 percent of the general population, represent approximately 9.4 percent of the states' prison inmates, but 17.9 percent of the federal prisoners' population. It may be noted, in this connection, that only 6 percent of federal prisoners are serving time for immigration offenses.

Federal prisoners' educational attainments are, on the average, higher than those of state prisoners. The new figures on federal inmates show that almost half are high school dropouts, only 50.5 percent having completed twelve years of schooling. Comparable 1979 statistics for state prisoners show that almost 60 percent were dropouts.

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Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

TWO RULES ANNOUNCED BY BUREAU OF PRISONS

The print media have been rife in recent months with reports of prison and jail suicides and suicide attempts. Government-initiated and private studies have underscored the need to identify would-be suicides and provide services to protect the welfare of individual inmates. Although definitive statistics on federal prison suicides are difficult to collect, the Bureau of Prisons considered the advisability of developing a systemwide method for the prevention of suicides in federal correctional institutions. Accordingly, on July 26 B.O.P. instituted a Suicide Prevention Program for the management of potentially suicidal inmates under federal jurisdiction. The Bureau's final rule on the program, published in 47 *Federal Register* 27218 (June 23, 1982), includes provisions for the designation of a full-time staff member as program coordinator for the institution's suicide prevention program, for training of staff for early recognition of potentially suicidal inmates, for training in crisis intervention techniques, and for selection and training of inmate "companions" (who will receive special monetary compensation for their time) to monitor potentially suicidal inmates. The regulations also call for special attention to facilities housing pretrial inmates.

On the same day, June 23, 1982 (in 47 *Federal Register* 27219), the Bureau of Prisons published its final rule authorizing the use of force, physical restraints, and chemical agents on inmates who are violent or who display signs of imminent violence. This rule, also, became effective July 26.

The new rule substitutes for a previous one specifying that only the warden could approve the use of restraints, and allows correctional supervisors in charge of a shift to decide when restraints should be applied. That official may authorize and ordinarily will supervise the application of restraints on an inmate who seems to be dangerous, because the inmate (1) assaults any person; (2) destroys government property (such as a commode or sink in a cell); (3) attempts suicide; (4) inflicts wounds upon self; or (5) displays signs that such violence is imminent. To a commenter to the proposed rule who points out that the new rule does not describe or define the type of physical restraints nor indicate which restraints are appropriate for different situations, the bureau replies, "It is not considered feasible to include this information in the rule." The rule does suggest as appropriate, however, the use of handcuffs, leg irons, and, when it is necessary to restrain an inmate for longer than eight hours, leather restraints, which may be attached to a bed.

As to chemical agents, the warden may authorize their use only when an inmate is armed and/or barricaded, or cannot be approached without danger to self or others, and a delay in bringing the situation under control would constitute a serious hazard to the inmate, to others, or result in a major disturbance or major property damage.

BOARD OF CERTIFICATION SCHEDULES INTERVIEWS IN SAN FRANCISCO

The Board of Certification for Circuit Executives will interview applicants in San Francisco August 16-17 at the U.S. Courthouse. Dates for the fall interviews, to be held in Washington, D.C., will be announced later.

Certification by the Board is a prerequisite for appointment as circuit executive in the twelve federal circuits, and as district court executive.

For application procedures write: Board of Certification, Federal Judicial Center, 1520 H St., N.W., Washington, D.C. 20005.

THE SOURCE

The Information Service of the Federal Judicial Center

The publications listed below may be of interest to those in the federal court system. Only those preceded by a checkmark are available through the Center. Requests should be in writing, preferably accompanied by a self-addressed, gummed mailing label (franked or unfranked), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, D.C. 20005.

ABA. Committee on Criminal Practice and Procedure, Section of Antitrust Law. *Jury Instructions in Criminal Antitrust Cases 1976-1980* (1982). (A copy of this publication is being mailed to all U.S. district court judges.)

✓Burger, Warren E. Address to the American Law Institute, Philadelphia, Pennsylvania, May 18, 1982.

Dorsen, Norman. Review of *The Enigma of Felix Frankfurter*, by N. H. Hirsch, 95 *Harvard Law Review* 367 (1981).

✓Kaufman, Irving R. "The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System." Tyrrell Williams Memorial Lecture, Washington University School of Law, March 24, 1982.

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U.S. AS PLAINTIFF CASES INFLATE CIVIL WORKLOAD

Federal courts 12-month statistics released

Appeals docketed and terminated in U.S. courts of appeals in the year ending March 31, 1982, continued to spiral upward, with appeals numbering 27,555, an increase of 10.8 percent over the 24,879 filed in 1981, and terminations up 13.7 percent or 27,120 as compared to 23,854 in 1981. Nevertheless, the percentage of pending appeals also rose, by 2 percent, and totaled 22,088 at the end of March as compared with 21,653 pending one year earlier. Still, five of the circuits reduced their pending caseloads, notwithstanding the overall increase in pending caseload: the D. C. Circuit (down 16.4 percent); the Ninth Circuit (down 8.8 percent); the Fifth Circuit (down 8.1 percent); the Second Circuit (down 3.4 percent); and the Eighth Circuit (down 1.3 percent.) The Third Circuit experienced the largest increase in pending caseload, up 33 percent.

These latest summaries of federal judicial workloads, together with detailed breakdowns by circuit, district, and other federal court activities, are contained in the *Federal Judicial Workload Statistics* For the Twelve Month Period Ended March 31, 1982, released in July by the A.O.'s Statistical Analysis and Reports Division. Part of the increased case activity, the A.O. reports, is due to the 1979 change in the *Federal Rules of Appellate Procedure* requiring courts of appeals to docket an appeal upon receipt of notice of the appeal from a lower court. To provide for inclusion of certain types of cases not reported by courts of appeals in prior years, reporting criteria were modified on July 1, 1980.

All circuits but one, the District of Columbia, experienced sizable increases in filings during the reporting year, with seven circuits reporting increases higher than 10 percent. The Fourth and First Circuits saw increases of 22.2 and 20.4 percent, respectively. Appeals in the D.C. Circuit, on the other hand, declined by 11.4 percent, due mainly to a 38.8 percent drop in new administrative agency filings.

Civil cases filed in the U.S. district courts also rose to a record high, by 12.2 percent over 1981, or 197,912 cases compared to the previous twelve months' 176,401 cases. Eighty districts registered increased filings, the most significant rises occurring in Minnesota (up 98.2 percent), the Middle District of North Carolina (up 69.5 percent), the Western District of Arkansas (up 66.5 percent), and the Northern District of Oklahoma (up 61.2 percent). These upswings result largely, according to the A.O., from the increased number of actions in these districts for recovery of overpayments and enforcement of judgments, especially recovery of overpayments of veterans' benefits. Over all the circuits, the federal government's efforts to recover defaulted student loans and benefit overpayments resulted in an increase of 67.6 percent in such cases, the largest increase in a case category. Other significant increases occurred in these categories: employment civil rights (up 28.7 percent), prisoner civil rights (up 13.8 percent), and labor litigation (up 11.6 percent). Categories showing the largest declines were: land condemnation (down 59.4 percent) and fraud, including truth-in-lending cases (down 21.7 percent).

Over two-thirds of the districts, or sixty-eight, witnessed increased termination activity, with Minnesota having the largest increase in dispositions, or 63.2 percent. Massachusetts, at the other end of the scale, declined in numbers of terminated cases by 42.5 percent.

In accordance with a March 1981 resolution of the Judicial Conference, many districts have been successful at reducing the number of cases pending three years or more. Thirty-five districts reduced their three-year-old caseload over the five-month period ending March 31, 1982, with the largest reductions experienced in the Southern District of West Virginia (down 52.9 percent), South Dakota (down 48.5 percent), and Massachusetts (down 48.4 percent).

Criminal case filings rose during the twelve-month period, by 5.3 percent over the previous comparable period, but at a slightly slower rate than during calendar year 1981 (5.7 percent). The number of terminations were exceeded by the number of cases filed, resulting in a 10.7 percent increase in pending cases, or 16,885 cases pending as compared to 15,248 cases pending on March 31, 1981.

Increases occurred in ten of the fifteen offense categories, the largest in embezzlement filings (up 14.4 percent), and auto theft (up 12.3 percent). Substantial increases also occurred in prosecutions under the Drug Abuse Prevention and Control Act, 11.6 percent higher than the preceding year, including a 45.3 percent increase in prosecutions for marijuana violations. Prosecutions for weapons and firearms violations also rose significantly, by 34.8 percent over the comparable period one year earlier.

U.S. bankruptcy courts received 523,750 bankruptcy estates in the twelve-month-period ending March 31, up 3.3 percent over the comparable period the preceding year. Although bankruptcy estate terminations increased by 40.5 percent, the number of pending bankruptcy estates rose 20.9 percent, reaching 697,460 estates. The largest increases were experienced in Puerto Rico (up 76.9 percent), the Western District of Pennsylvania (up 49.5 percent), the Virgin Islands (up 42.1 percent), South Carolina (up 40.6 percent), and the Eastern District of Texas (up 37.9 percent).

PAROLE COMMISSION PROPOSES AMENDMENTS TO SEVERITY SCALE

The U.S. Parole Commission has proposed changes in its offense severity scale [see 47 *Federal Register* 27567-27572 (June 25, 1982)]. This scale is a part of the commission's paroling policy guidelines, which were established pursuant to congressional mandate and are used by the commission to help establish an appropriate release date for federal prisoners.

The guidelines consist of two dimensions. The first dimension, the offense severity scale, is a listing of offense behavior examples and provides a means by which the commission rates the seriousness of a prisoner's offense. Proposed changes in this scale, therefore, can affect the time that certain federal offenders can be expected to serve in prison.

The second dimension, unaffected by the current proposal, is an actuarial table that aids the commission in assessing the degree to which the applicant's background indicates likely success or failure on parole.

The majority of the proposed amendments merely clarify present commission policy and improve the organization of the offense behavior examples. In addition, the proposal would add a number of new examples to the scale (e.g., assault, civil rights, and antitrust offenses, and aiding and abetting behavior).

Some proposed amendments, however, constitute substantive changes in the current offense severity scale. These include: (1) the addition of a higher rated classification for extremely large-scale marijuana offenses; (2) an increase in the rating for most forcible sex offenses; (3) an increase in the severity rating for the sale or possession of machine guns or sawed-off shotguns; (4) an increase in the rating of criminal entry offenses involving an armory; (5) a provision for an increased severity level for those instances in which offenders prompt the legitimate firing of weapons by law enforcement officials; and (6) a provision that offenses which are unconsummated conspiracies should be rated, in most circumstances, as if the conspiracy had been consummated.

The commission has requested comments on this proposal. Any comments on the amendments or any other aspect of the commission guidelines should be sent by October 10, 1982, to: U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, MD 20815.

CONSTITUTION-WRITING SEMINAR TO BE HELD

As part of the American Enterprise Institute's ten-year commemoration of the U.S. Constitution's bicentennial anniversary, a seminar on constitution-writing will be held in Washington in late spring 1983. Eminent international figures who have been instrumental in the construction of their own constitutions have been designated to present essays on their experiences at a four- to five-day seminar, which is scheduled also to involve about thirty-five additional invited participants. Chief Justice Warren E. Burger has agreed to be honorary chairman of the proceedings. Precise dates and locations of the event are yet to be announced.

The aim of the A.E.I. in sponsoring the seminar is to explore ways in which governments are formed in non-totalitarian societies. It is the institute's hope that participants will go beyond the merely legal framework of their constitutions and describe those aspects of their political lives that are shaped and energized by these documents. Areas likely to be discussed will include separation of powers, the role of religion, federal-national relationships, and the place of armed forces in the government.

Those who have tentatively agreed to deliver essays to the invited assemblage are Chief F.R.A. Williams of Nigeria, Professor Jovan Djordjevic of Yugoslavia, Michel Debré of France, Gamal el-Oteifi of Egypt, Justice Francisco Rubio Llorente of Spain, and Constantine Tsatsos of Greece.

Following the Washington proceedings, the essays of these participants and of invited respondents will be published in book form as one of the A.E.I.'s bicentennial series of essays.

LITTLE CHANGE IN CRIME RATES FROM 1980 TO 1981

The overall crime rate in the U.S. in 1981 did not change significantly from that of 1980, preliminary data from the FBI's annual report on crime trends show. As a broad category, violent crimes increased only 1 percent, reflecting a 5 percent increase in robbery, but decreases of 3 percent in murder, 1 percent for rape, and 3 percent for aggravated assault.

These 1981 and more recent figures contrast dramatically with rising crime rates of previous years. For example, comparable figures for 1980, which was the peak crime year in U.S. history, showed a 10 percent overall crime rise over 1979 rates.

(New data for 1982 are indicators of a recession in the crime rate, adds Paul Zolbe, Chief of the FBI's Uniform Crime Reports Section, with many major cities reporting an overall decline in crime during the first quarter of 1982.)

Crimes against property during 1981 also showed no change over 1980 figures. Property crimes in 1980, on the other hand, were 9 percent more numerous than the total in this category in 1979.

The early-released data on 1981 crimes are taken from the FBI's final statistical wrap-up of 1981 crime, *Crime in the United States—1981*, which will be published on August 26. The document will be for sale through the Superintendent of Documents, GPO.

STOORZA NAMED AN ASSISTANT DIRECTOR OF A.O.

Edwin L. (Larry) Stoorza, Jr., 42, has been named Assistant Director of the A.O. for Management Systems and Services. In his new position, he is director of the activities of the Statistical Analysis and Reports Division, the Administrative Services Division, and the Systems Services Division. Prior to this appointment, Mr. Stoorza was Chief of the Systems Services Division at the A.O.

A native of Fort Worth, Texas, Mr. Stoorza was graduated from the University of Oklahoma with a B.S. in mathematics. After four years in the U.S. Navy, he embarked on a career in computer programming and systems analysis. Since 1976, first with the FJC and later with the A.O., he has been performing numerous planning and management functions in court automation activities of the two agencies.

Mr. Stoorza replaces John E. Allen, who resigned to enter the private sector.

Edwin L. Stoorza, Jr.

RULES, from p. 1

Criminal Rules are primarily to update the rules in light of the 1979 amendments to the Federal Magistrates Act, correct some inaccuracies and simplify some procedures. The amendments to the rules governing Section 2254 and Section 2255 proceedings eliminate the requirement that petitions be "sworn to" and provide that the signing of the petition is "under penalty of perjury."

An amendment to Rule 4 of the Federal Rules of Civil Procedure was also announced by the Supreme Court. That amendment, recommended by the Judicial Conference at its March 1982 meeting (see *The Third Branch*, April 1982, p. 3), has been held up by Congress. A bill delaying it was signed by the president on August 3. Hearings on the amendment are scheduled before a subcommittee of the House Judiciary Committee in early September.

INSTITUTE, from p. 1

conducted by research teams who will be advised and guided by eminent members of the legal profession. In addition, the institute will serve as a storehouse of information on judicial administration, and will make such data and ideas available to all interested parties. A reference library is also planned, as well as publication of works and research conclusions on aspects of judicial administration.

On August 14 a seminar inaugurating the institute and its first research project was held at Sydney University. An intensive investigation has been set in motion to identify, through empirical research and the acquisition of statistics, the nature and dimensions of problems causing court delays and inefficiency. When these barriers have been identified, the institute will commence further projects to determine methods of surmounting them.

Mr. Justice Russell Fox, a member of the Federal Court of Australia, and the AIJA's Chairman, has visited the Federal Judiciary Center in past years, and Dr. Ross Cranston, the first research project director of the AIJA, visited the Center and the Administrative Office early this summer for assistance in preparing the institute's first research project.

POSITIONS OPEN

CHIEF DEPUTY CLERK, U.S. COURT OF APPEALS, ELEVENTH CIRCUIT, ATLANTA, GEORGIA. Duties include general office management, such as supervising caseflow, records maintenance, personnel, financial activities, management of information systems, rules; and role in setting policy, planning, and quality control. Salary from $33,586 to $46,685. Requires a minimum of six years of administrative experience, with at least three years in highly responsible management position. Closing date for applications is September 3, 1982. Send application and resume to: Norman E. Zoller, Clerk; U.S. Court of Appeals, Eleventh Circuit; 56 Forsyth St., N.W.; Atlanta, GA 30303.

MANAGER, SANTA ANA DIVISIONAL OFFICE, BANKRUPTCY COURT OF CENTRAL DISTRICT OF CALIFORNIA. This court official is responsible for managing a geographically separate divisional Bankruptcy Court clerk's office (19 clerical staff), largely independent of the office headquarters in Los Angeles. Salary to $39,689 (JSP-14), depending on qualifications. Requires six years of administrative, supervisory, managerial, or professional experience, including three years of supervisory experience in a court environment. Bankruptcy experience preferred. Closing date for applications is September 8, 1982. Application forms may be obtained from the Clerk's Office, U.S. Bankruptcy Court, 906 U.S. Courthouse, 312 North Spring St., Los Angeles, CA 90012, or by telephoning (FTS) 798-3126 or (213) 688-3126.

CHIEF PROBATION OFFICER, U.S. COURT OF APPEALS, EASTERN DISTRICT OF WISCONSIN. This official is responsible for the probation and parole programs in the district. The position will be at the JSP-13, -14, or -15 level, depending upon qualifications and experience. Salary range $33,586 to $57,500. Closing date for applications is August 31, 1982; starting date is January 3, 1983. Applicants within the federal probation system should send a resume to: Sofron Nedilsky, Clerk; U.S. District Court, Eastern District of Wisconsin; 362 Federal Building; Milwaukee, WI 53202. Applicants outside the federal system should submit an SF-171 and a resume to: Chief Judge John W. Reynolds at the above address. For further information write or call Mr. Nedilsky at (414) 291-3372 or (FTS) 362-3372.

EQUAL OPPORTUNITY EMPLOYERS

No man is justified in doing evil on the ground of expediency.

Theodore Roosevelt.
The Strenuous Life: Essays and Addresses (1902).

Noteworthy

In 1981, the U.S. Bankruptcy Court for the District of Utah, in cooperation with the continuing legal education division of the Utah State Bar, presented its first pair of dual seminars—one for lawyers and one for legal assistants and legal secretaries—on the current state of bankruptcy procedures and law in Utah. The programs were so well received that the court and the bar again presented dual seminars on May 7, 1982.

At the latest session, over 180 lawyers and about 100 legal assistants met separately to discuss bankruptcy law with court officers, employees, and trustees of the court. Seminar sponsors now plan to hold these programs annually.

* * *

The Judges of the U.S. District Court for the Northern District of Georgia have created a "Bar Council," consisting of eleven lawyers who are engaged in the active (and substantial) practice of law in the U.S. District Court for the Northern District of Georgia. The council will serve as liaison between the area bar and the district court.

The council plans to meet at least once a year with the district judges to discuss the district's administration of justice and to provide a dialogue between the bench and bar.

POSITION OPEN

CLERK, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI, FLORIDA. The clerk manages the administrative activities and statutory duties of the clerk's office. Salary to $54,755, depending on qualifications. Requires a minimum of ten years of administrative experience in public service or business, with at least three years in highly responsible management position. Professional and educational achievements may substitute for some experience requirements. For further information on qualifications, write to the court, address below. Closing date for applications is September 17, 1982. Mail application and resume to: Mrs. Dyana Ortiz-Castro, District Court Executive, P.O. Box 10590, Miami, FL 33101.

EQUAL OPPORTUNITY EMPLOYER

Each council member will serve three years and no member can be selected for more than one full term.

The organizational meeting of the council has been scheduled for mid-August. Any attorneys having comments or suggestions concerning the council or its functions may send them to Robert D. Feagin, 3900 First Atlanta Tower, Atlanta, Georgia 30383, telephone number (404) 658-9150.

* * *

A new edition of the Dictionary of Criminal Justice Data Terminology has been published by the Bureau of Justice Statistics of the Department of Justice. The dictionary is designed to establish standardized definitions of about 700 criminal justice terms for purposes of federal statistical reporting. It is intended as a basic reference work for all concerned with criminal justice statistics, including data users.

Single copies of the dictionary, identified as NCJ-76939, are available from the National Criminal Justice Reference Service, P.O. Box 6000, Rockville, MD 20850; multiple copies are for sale by the Superintendent of Documents, GPO.

* * *

The Center is now making available edited videocassettes of the Social Security Seminar developed by the Eastern District of New York for volunteer attorneys to *pro se* litigants. The seminar, conducted April 6, was the first of a projected series of training seminars for panels of *pro bono* lawyers organized under the guidance of Chief Judge Jack B. Weinstein. The four-tape, 174-minute program is accompanied by a volume of printed material and may be requested through: John Hawkins, Media Services Unit, Dolley Madison House, 1520 H Street, N.W., Washington, DC 20005. (Court personnel may use FTS 633-6416.)

* * *

In fiscal year 1981, the authorized staffing of the U.S. Marshals Service resulted in a ratio of 1.9 marshals per federal judge. In 1982, the authorized assignments fell to 1.1 marshals per federal judge. According to a USMS spokesman, the ratio in 1983 may dwindle to as low as 0.9 marshal for each judge.

* * *

Until 1979 yearly average increases in jury awards in personal injury cases usually lagged behind annual increases in the Consumer Price Index. In 1979, however, jury awards for all courts, nationwide, outstripped that year's 11.5 percent increase in the C.P.I., when an average award size rose 17.71 percent over the average for 1978. That indicator presaged a trend, claims the company that maintains these statistics, Jury Verdict Research, Inc., of Solon, Ohio. In 1980, when the C.P.I. rose 13.5 percent, jury awards leaped ahead of the previous year's average, being 24.54 percent larger than those meted out in 1979. Data for 1981, when the C.P.I. rose 10.6 percent, are not all complete but the company has projected an increase of 33.57 percent over 1980's awards.

Jury Verdict Research collects nationwide verdict data, and based these statistics on collections of four types of cases—cervical strain (whiplash), knee injury, vertebral fractures, and wrongful death of adult males—because these categories are considered indicative of jury awards for other personal injuries.

PERSONNEL

NOMINATIONS

Richard A. Gadbois, Jr., U.S. District Judge, C.D. CA, June 29

Patrick E. Higginbotham, U.S. Circuit Judge, CA-5, July 1

E. Grady Jolly, U.S. Circuit Judge, CA-5, July 1

Antonin Scalia, U.S. Circuit Judge, CA-DC, July 15

J. Lawrence Irving, U.S. District Judge, S.D. CA, July 15

William M. Acker, Jr., U.S. District Judge, N.D. AL, July 22

Harry W. Wellford, U.S. Circuit Judge, CA-6, July 27

Michael M. Mihm, U.S. District Judge, C.D. IL, July 27

Bruce M. Selya, U.S. District Judge, D. RI, July 27

CONFIRMATIONS

J. Lawrence Irving, U.S. District Judge, S.D. CA, July 28

John P. Moore, U.S. District Judge, D. CO, June 24

Thomas P. Jackson, U.S. District Judge, D. DC, June 24

Henry A. Mentz, Jr., U.S. District Judge, E.D. LA, June 24

Jaime Pieras, Jr., U.S. District Judge, D. PR, July 13

Patrick E. Higginbotham, U.S. Circuit Judge, CA-5, July 27

E. Grady Jolly, U.S. Circuit Judge, CA-5, July 27

Richard A. Gadbois, Jr., U.S. District Judge, C.D. CA, July 27

APPOINTMENTS

Maurice M. Paul, U.S. District Judge, N.D. FL, June 24

A. J. McNamara, U.S. District Judge, E.D. LA, June 25

George C. Pratt, U.S. Circuit Judge, CA-2, June 29

Henry A. Mentz, Jr., U.S. District Judge, E.D. LA, June 30

John P. Moore, U.S. District Judge, D. CO, July 2

Thomas P. Jackson, U.S. District Judge, D. DC, July 8

John W. Potter, U.S. District Judge, N.D. OH, July 9

ELEVATIONS

S. Hugh Dillin, Chief Judge, S.D. IN, July 1

Francis J. Boyle, Chief Judge, D. RI, July 6

Hiram H. Ward, Chief Judge, M.D. NC, July 12

SENIOR STATUS

Bailey Brown, U.S. Circuit Judge, CA-6, June 16

Joseph S. Lord, III, U.S. District Judge, E.D. PA, July 1

Edwin L. Mechem, U.S. District Judge, D. NM, July 2

Raymond J. Pettine, U.S. District Judge, D. RI, July 6

Reynaldo G. Garza, U.S. Circuit Judge, CA-5, July 7

Eugene A. Gordon, U.S. District Judge, M.D. NC, July 12

DEATH

Orma R. Smith, U.S. District Judge, N.D. MS, July 5

ao℅fjc calendar

Aug. 16-19 Juror Utilization and Management Workshop

Aug. 17-20 Advanced Video Production Workshop

Aug. 19-20 Judicial Conference Committee on Rules of Practice and Procedure

Aug. 23-25 Case Calendaring Control and Management Workshop

Aug. 25-27 Workshop for Newly Appointed Training Coordinators

Aug. 26-28 Judicial Conference Committee on the Budget

Aug. 30 - Sept. 2 Workshop for Clerks of Bankruptcy Courts

Sept. 7-10 Third Circuit Judicial Conference

Sept. 9-12 Second Circuit Judicial Conference

Sept. 13-15 Seminar for Magistrates

Sept. 20-22 Case Calendaring Control and Management Workshop

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SEPTEMBER 1982

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DEPOSITORY 37

JUSTICES PROPOSE VARYING SOLUTIONS TO SUPREME COURT OVERLOAD

Five members of the United States Supreme Court, speaking to five separate audiences during August and September, urged varying solutions to the problems of Supreme Court overload.

Particularly striking were the differing views of Justices John Paul Stevens, Byron R. White, and William J. Brennan on how to decide what the Court should decide. In fact, Justice Stevens proposed creation of a national court of appeals that would be granted more power than the Freund Study Group would have granted to the court it proposed ten years ago.

Justice Stevens discussed the Court's certiorari review function in an August address to the American Judicature Society in San Francisco. Three days later Justice White, in a talk to the American Bar Association's Antitrust Section, characterized Justice Stevens's proposal as "plastic surgery" and presented a range of structural and procedural alternatives. Justice Lewis Powell, speaking to the Judicial Administration Division, emphasized the need to deal with Americans' overreliance on state and federal courts.

Justice Brennan, in remarks to the Third Circuit Judicial Conference, responded that Justice Stevens's proposal "would destroy the role of the Supreme Court as the Framers envisaged it." Justice Thurgood Marshall focused his address to the Second Circuit Judicial Conference on a matter to which two of the others had referred briefly: the Supreme Court's increasing use of summary dispositions.

The volume of cases the Supreme Court decides on the merits was a recurring theme. "The mounting tide of litigation," Justice Stevens said, "is threatening to engulf our Court." Justice Brennan observed that it "taxes [human] endurance to its limits" to give full plenary review to 150 of the complex cases on today's docket.

Justice White also noted that 150 cases has long been thought

See JUSTICES, p. 6

SEMINAR SCHEDULED FOR NEW APPELLATE JUDGES

The next FJC Seminar for Newly Appointed Federal Appellate Judges will take place in December at the Dolley Madison House in Washington beginning with a reception on Sunday evening, December 12, for participants, faculty, and spouses. Sessions will end Wednesday evening, December 15, and the seminar will culminate that night with a dinner at the Supreme Court. Participants will be notified well in advance by Center personnel about seminar arrangements and travel authorizations.

The last seminar for appellate judges was held at the Center in March 1980.

DIVERSITY JURISDICTION BILL PASSED BY HOUSE JUDICIARY COMMITTEE

The House Judiciary Committee has approved a bill to abolish diversity of citizenship jurisdiction. The Diversity Jurisdiction Reform Act of 1981 was passed by the House committee by a 16-10 vote on August 10. The bill, cosponsored by M. Caldwell Butler (R-Va), Robert W. Kastenmeier (D-Wis), and eighteen other members, was reported out of full committee as H.R. 6816.

Similar legislation was passed by the House twice in 1978, but died in the Senate. At this time, diversity legislation is not being processed by the Senate.

At public hearings in July before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Assistant Attorney General Jonathan Rose estimated that the abolition of diversity jurisdiction would save nearly $9 million a year.

A recent statement by the Administrative Office, submitted to the full House Judiciary Committee, however, estimated that the federal government could save $160.8 million over the next five years. This amount includes savings of costs directly attributable to diversity cases as well as "cost avoidance" for new resources that would have to be added to the federal judiciary to handle expected increases in

See JURISDICTION, p. 3

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THREE CENTER REPORTS ADDRESS ISSUES IN THE U.S. COURTS OF APPEALS

The Federal Judicial Center will soon have available three publications dealing with various aspects of the U.S. Courts of Appeals. Each may be ordered as described below.

The Seventh Circuit Preappeal Program: An Evaluation, by Jerry Goldman, describes the Center's evaluation of the preargument case treatment program developed by the Seventh Circuit Court of Appeals to encourage speedier disposition for litigants, reduction in the total amount of time required of the attorneys, and reduction of judicial and administrative workload. The Center undertook the evaluation at the request of the court.

The Seventh Circuit program, instituted in 1978, departed in two substantial ways from preappeal programs in other federal and state courts. First, the court evaluated the program according to a set of specific expectations that the court believed could justify continuation of the program. Unlike some other preargument appellate programs, encouraging settlements was not regarded as a primary objective; rather, the principal benefits to the court were expected to be reduction in motion practice and in the size of briefs and appendixes. Second, the evaluation of the program attempted to compare the effectiveness of preparing conferences conducted jointly by a circuit judge and a senior staff attorney with the effectiveness of conferences conducted by a senior staff attorney alone.

The report provides a summary of the approach and objectives of the preappeal program; a methodological section detailing the evaluation of the program; an examination of the evidence from case files and an attorney survey addressing the effectiveness of the program; and an assessment of the benefits of the program in relation to its costs.

The Cases of the United States Court of Appeals for the District of Columbia Circuit, by Gordon Bermant, Patricia A. Lombard, and Carroll Seron, assesses the relative judicial and administrative burdens produced by five case types, classified as administrative agency, U.S. civil, private civil, criminal, and "other."

The authors analyzed a random sample of one hundred cases from the U.S. Court of Appeals for the D.C. Circuit that terminated in fiscal 1980 after submission on briefs or oral argument. The D.C. Circuit was chosen for study because of its large number of agency cases and U.S. civil cases, generally regarded as more burdensome than other types of

See REPORTS, p. 4

VIDEO TELECONFERENCE ON OFFENDER SUPERVISION TO BE HELD

On September 28 the FJC will sponsor a video teleconference on the identification and supervision of narcotics offenders for an audience largely made up of probation officers, scattered at various viewing sites in metropolitan centers around the nation. Using the facilities of public television station WETA-TV in the Washington, D.C., suburb of Arlington, Virginia, a faculty composed of members of the U.S. Probation Office will present to a live audience seminar materials that will be broadcast by satellite to twelve "receiving" public television stations. At these receiving stations, six to seven hundred federal, state, and local parole and probation personnel and other federal law enforcement officers will watch monitors and listen to the two-way audio, one-way video presentation. At predetermined intervals in the several-hour program, questions and comments of seminar participants at the receiving stations will be directed by means of telephone lines to the seminar faculty at WETA-TV's studio.

WETA-TV will also videotape the proceedings, and edited videocassettes will be available for distribution by the FJC approximately one month after the program is held.

The Center's last video teleconference seminar, on the identification and supervision of white-collar criminals, was held on May 12. This program originated from Dallas, Texas, educational television station, KERA-TV. Most of the faculty members and most of the 734 seminar attendees at the first seminar were also probation officers. (One prior satellite video teleconference seminar, on pretrial services, emanated from Washington in September 1981.)

Although the forthcoming seminar will broadcast to twelve receiving sites, rather than the twenty sites utilized in the previous seminar, attendance is expected to equal or exceed the number of participants in the earlier program, because selected probation officers stationed within two hundred miles of a receiving site will receive travel authorizations to attend.

Edited videocassettes of the Dallas seminar on supervising white-collar criminal clients are currently available for distribution by the Center. Requests should be made in writing to: John Hawkins, Media Services Unit, 1520 H Street, N.W., Washington, D.C. 20005.

The Third Branch

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1982-83 JUDICIAL FELLOWS ANNOUNCED

Ms. Horney, Mr. O'Brien, Ms. Perlstein

Julie Horney, David O'Brien, and Jolanta (J.J.) Perlstein have been selected to be Judicial Fellows for 1982-83 by the Judicial Fellows Commission. During their year as fellows, they will perform a variety of tasks and carry out projects designed to help resolve administrative problems facing the Supreme Court, the FJC, the A.O., and the federal judiciary in general. Mr. O'Brien and Ms. Perlstein have been assigned to the Supreme Court, and Ms. Horney is working at the FJC.

The Judicial Fellows Program was established in 1973 to enable young professionals with high interest in judicial planning and management to work with top officials in judicial administration, and to contribute both during their tenure as fellows and afterward to judicial modernization. The Judicial Fellows Program is similar to the White House and Congressional Fellows programs, and some social and guest speaker activities are shared by White House and Judicial Fellows. The National Academy of Public Administration administers the Judicial Fellows Program.

As has become customary, the new Fellows arrive at their posts with multi-disciplinary backgrounds, wide research experience, academic success both as students and as teachers, and as prolific writers of published materials.

Julie Horney, 34, most recently an associate professor in the department of criminal justice at the University of Nebraska at Omaha, received a B.A. with honors in psychology in 1969 from the University of North Carolina and a Ph.D. in experimental psychology from the University of California at San Diego in 1973. She has received numerous grants and predoctoral and postdoctoral fellowships, including several from the National Institute of Mental Health and the Center for Applied Urban Research of the University of Nebraska. Ms. Horney is the author of various journal articles and has frequently given addresses and presented papers to professional groups, often on aspects of plea bargaining.

David M. O'Brien, 31, holds a B.A. with highest honors in philosophy and political science (1973), an M.A. (1974), and a Ph.D. from the University of California at Santa Barbara. His teaching experience includes posts at his alma mater, at the University of Puget Sound, and, for the last three years, at the University of Virginia. He is the recipient of several research awards, is a Russell Sage Fellow, and is the author of numerous law review and professional journal articles and several books, including *Privacy, Law, and Public Policy* (1979) and *The Public's Right to Know* (1981).

Jolanta J. Perlstein, 28, received a B.A. with highest distinction in 1974 from the University of Illinois and an M.A. (1975) and a Ph.D. in 1980 from Northwestern University. She, too, has been active in college teaching, having taught courses in American government and law and politics at Northwestern. Most recently, she has held various positions at the U.S. Department of Justice in the Federal Justice Research Program in the Office for Improvements in the Administration of Justice. She is the author of papers in the areas of diversity jurisdiction and judicial discipline.

The 1982-83 Judicial Fellows Commission, selected by the Chief Justice, comprises: Senior Judge Walter E. Hoffman (E.D. Virginia); Mark W. Cannon, Administrative Assistant to the Chief Justice; William E. Foley, Director of the A.O.; George A. Graham, professor of public administration at Nova University; Erwin N. Griswold, former dean of Harvard Law School; Judge Amalya L. Kearse (Second Circuit); A. Leo Levin, Director of the FJC; Associate Justice Sandra Day O'Connor, U.S. Supreme Court; and Kenneth Rush, former Deputy Secretary of State.

JURISDICTION from p. 1

diversity cases. The direct cost savings would accrue over a three-year period because of the approximately 60,000 diversity cases that would remain pending if diversity jurisdiction were eliminated in 1982. Direct cost savings due to decreased needs for clerical personnel and space for that period would result in a total savings of approximately $10.7 million.

In addition, because a disproportionately large number of diversity cases are terminated by jury trials, the abolition of diversity jurisdiction would result in a direct savings of approximately $4.8 million in jury costs for the same three-year period.

With respect to "cost reduc-

See JURISDICTION, p. 4

REPORTS from p. 2

cases. Moreover, the study was requested in connection with the legislative debate on proposals that could increase the judicial burden created by agency appeals, and there was a need to complete it as expeditiously as possible.

Burden was measured using objective, quantitative indexes of case size, indexes provided by judges themselves in earlier Center studies. Indicators of input burden, defined as the material coming into the court for consideration, included such items as the number and aggregate length of briefs, number of issues and case citations in the appellant's lead brief, and the size of joint appendixes. Indicators of output burden, defined as the court's response to the input, included, for example, length of the published opinion, number of citations in the opinion, and whether the opinion was signed or per curiam.

The study provides strong statistical evidence that agency cases, and to a slightly lesser extent, U.S. civil cases, are dramatically more burdensome, in terms of input to the court, than other case types. For almost every input indicator examined, agency cases showed the maximum size—whether by the number of lawyers (26) or by the number of briefs (750). Differences between case types in output burden were not as clear-cut.

An additional analysis of four extremely burdensome agency cases underscores the dramatic impact these cases can have on the workload of the court.

The authors note that they did not attempt to analyze qualitative, as distinguished from quantitative, dimensions of case burden (e.g., the content, as opposed to the size, of appendixes). Moreover, given the impetus for the study, its conclusions are limited to the relative burdens found in the D.C. Circuit, with its unusual caseload, leaving unanswered the questions of intercircuit comparisons.

Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures, by Russell R. Wheeler and Charles W. Nihan, was written at the request of the Conference of Chief Judges. It describes how the chief judges of the federal appellate courts discharge their administrative responsibilities to all courts in the circuit. These responsibilities include maintaining relations with the bar and the public; dealing with problems of alleged judicial unfitness; planning improvements in, as well as monitoring the status of, case-flow management in the circuit and district courts; and duties related to personnel, budget, equipment acquisition, and similar matters.

Most of the data for the report came from interviews with chief judges (current and former), circuit executives, and other court personnel. Five general impressions emerged from these interviews: (1) Chief judges' administrative duties impose a greater burden than would be indicated by simple estimates of time devoted to them. (2) Chief judges tend to understate the importance of their administrative responsibilities, apparently feeling that they are not an exercise of the law-declaring function they were appointed to serve. (3) Chief judges differ less in their specific administrative procedures than in their overall approach to administration. (4) The circuits are in transition to a new administrative era: the growth in the size of the judiciary and the newness of the circuits' leadership may have contributed to a decrease in the chief judges' detailed personal involvement in all aspects of circuit business. (5) Current conditions may require a change in administrative approach: chief judges will likely find it necessary to restrict the amount of time and attention they devote to solving individual problems, to further restrict their judicial case work, and to delegate more administrative duties.

In addition to detailed descriptions of how the chief judges approach their administrative responsibilities, the report includes a collective assessment by the chief judges of the relative importance of giving their personal attention to the various administrative tasks that fall to them. Finally, the report reviews several suggestions for strengthening the administrative component of the chief judge's role.

To order copies: Copies of all three reports will be sent automatically to all chief judges, circuit executives, and clerks of court. In addition, copies of the Goldman and Bermant *et al.* studies will be sent, respectively, to the judges of the Seventh and D.C. Circuit Courts of Appeals; the Wheeler-Nihan study will be sent automatically to all members of circuit judicial councils.

See REPORTS, p. 6

JURISDICTION from p. 3

tion," the A.O. report noted a steadily increasing diversity caseload over the past fifteen years and, based on that experience, projected an increase from 50,000 cases in 1982 to over 71,000 in 1987. If diversity jurisdiction were eliminated, and therefore, the predicted increase did not occur, projected increases in clerical staff and space would be unnecessary. In addition, the A.O. estimates that the Judicial Conference could reduce its pending request for additional judgeships by twenty if diversity jurisdiction were eliminated.

The statement, entitled "Estimated Budgetary Consequences of Abolishing Diversity Jurisdiction," was prepared by the Financial Management Division of the A.O. pursuant to congressional request, and was released August 9, 1982. This is one of a number of judicial impact statements prepared by the A.O. at the request of Congress, to advise on the potential impact on the judiciary of pending legislation.

THE SOURCE

The Information Service
of the Federal Judicial Center

The publications listed below may be of interest to *The Third Branch* readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to author, title or other description, and ISIS Database Number (in parentheses following the item). Requests should be in writing, preferably accompanied by a self-addressed, gummed mailing label (franked or unfranked), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, D.C. 20005.

Bass, Jack. *Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court's "Brown" Decision into a Revolution for Equality*. Simon and Schuster, 1981.

Bloomfield, Maxwell. "The Supreme Court in American Popular Culture." 4 *Journal of American Culture* 1 (1981).

✓ Brennan, William J. Remarks before the 3d Circuit Judicial Conference, September 9, 1982. (#2803)

✓ Bumpers, Dale. Presentation before the 8th Circuit Judicial Conference, July 1982. (#2802)

✓ Devitt, Edward J. "Should Jury Trial Be Required in Civil Cases? A Challenge to the Seventh Amendment." 47 *Journal of Air Law and Commerce* 495 (1982). (#2795)

✓ Heflin, Howell. Speech before the Senate in response to Justice John Paul Stevens's speech to the American Judicature Society, August 8, 1982. (#2797)

Hyman, Harold M., and Wiecek, William M. *Equal Justice Under Law: Constitutional Development 1835-1875*. Harper & Row, 1982.

Levin, A. Leo, and Wheeler, Russell R., eds. "The American Judiciary: Critical Issues." The ANNALS of the American Academy of Political and Social Science, July 1982, including articles by Judges Abner Mikva, Alvin Rubin, Edmund Spaeth, and Patricia Wald; Senators Charles Mathias and Arlen Specter; and Terrence Adamson, Griffin Bell, William Eldridge, Sheldon Goldman, Daniel Meador, Paul Michel, and Daniel Skoler.

✓ Markey, Howard. "Technology in the Courtroom—And How to Slay the Monster." Presentation before the 8th Circuit Judicial Conference, July 1982. (#3020)

✓ Marshall, Thurgood. Remarks before the 2d Circuit Judicial Conference, September 9, 1982. (#3023)

✓ Powell, Lewis F., Jr. Speech before the American Bar Association, Division of Judicial Administration, August 9, 1982. (#2783)

✓ Schwartz, David. "Two New Federal Courts." 68 *ABA Journal* 1091, September 1982. (Presents guidelines for practice before the new Court of Appeals for the Federal Circuit and the new U.S. Claims Court.) (#2801)

Shapiro, Martin. *Courts: A Comparative and Political Analysis*. University of Chicago Press, 1981.

Sherman, Michael, and Hawkins, Gordon. *Imprisonment in America: Choosing the Future*. University of Chicago Press, 1981.

✓ Smith, William French. Remarks before the 9th Circuit Judicial Conference, July 28, 1982. (#2798)

✓ Stevens, John Paul. Remarks before the American Judicature Society, August 6, 1982. (#2796)

Ulmer, S. Sidney, ed. *Courts, Law, and Judicial Processes*. The Free Press, 1981.

✓ Wald, Patricia M. "Some Observations on the Use of Legislative History in the 1981-82 Supreme Court Term." Presentation before the 8th Circuit Judicial Conference, July 1982 (#2800)

✓ White, Byron R. Remarks before the Section of Antitrust Law of the American Bar Association, August 10, 1982 (#2784)

ABA ACTS ON RESOLUTIONS

The following actions were taken in the ABA House of Delegates in response to proposed resolutions at their sessions in August. A majority of the delegates decided:

- To support pending legislation to tax attorneys' fees as part of court costs for a court-appointed attorney in an action brought by a juror to protect his employment rights; to extend statutory compensation for work injuries to all persons rendering federal jury service; and to authorize the service of jury summonses by ordinary mail.
- To repeal Canon 3A(7) of the Code of Judicial Conduct and adopt a new canon that would permit a judge to authorize camera coverage under rules prescribed by the appropriate authority in each state. The recommendation also amends Chapter 8 of the Fair Trial and Free Press Report (included in the Standards for Criminal Justice) to allow camera coverage under rules that are consistent with the right to a fair trial. The vote was 162 for approval and 112 against.
- To support amendment of the Equal Access to Justice Act, to provide, among other things, for fee awards to be paid by a government agency when it is the losing party, to clarify the act to ensure that it also covers appellate proceedings in which judicial review of agency action is sought, and to cover proceedings in the U.S. Tax Court.
- To support extension of the special prosecutor provisions of the Ethics in Government Act of 1978. Eleven approved amendments include proposals to: limit the crimes and persons covered by the act; grant the Attorney General greater latitude in conducting or declining to conduct investigations; permit the Attorney General to use compulsory process during a preliminary

See ABA, p. 8

JUSTICES from p. 1

the maximum feasible number for one term. However, he warned, in the 1982 term "the Court granted review in more cases than it could hear in a single term....Our docket is now full through February of next term" and will probably be completely full by the end of November. "What this means is that we shall not be current in our work." Justices Brennan and Stevens attributed this situation, in part, to the Court's granting certiorari in cases that, Justice Brennan said, "present no necessity for announcement of a new proposition of law."

But, while Justice Brennan would reduce the Court's workload by having it exercise greater restraint in granting certiorari, Justice Stevens would do so by giving the review function to another set of judges on another, new court. To him, the certiorari review function is less important work for the justices than actually deciding the cases; it can be delegated to a new court "to which the Supreme Court would surrender some of its present power—specifically the power to decide what cases the Supreme Court should decide on the merits." Because the new court would have decisional power—not simply the recommending power that the Freund Study Group would have granted to its proposed national court—it would attract able judges eager to serve on it. "The vast flood of paper and the small army of administrative personnel associated with the processing of our certiorari docket," Justice Stevens hoped, could be removed from the Supreme Court by his proposal.

Justices Brennan and White, however, took strong exception to the Stevens proposal. "The screening function," Justice Brennan argued, "is second to none in importance." It links the justices to "the everchanging concerns of this society with ever more powerful and smothering government." Dissents from denials of review, for example, "played a crucial role in the Court's reevaluation of the reapportionment question, and the question of the applicability of the Fourth Amendment to electronic searches."

Justice White, elaborating on his terse characterization of Justice Stevens's proposal as "plastic surgery," asserted that if the Court lacks the capacity to give a hearing to all the cases that deserve it, "permitting someone else to choose our 150 cases does not address the fundamental problem." To him, the fundamental problem is not created by reviewing certiorari petitions but, rather, that last term "apparently there were just too many petitions for certiorari that we could not conscientiously deny."

Justice White noted the possibility of creating a National Court of Appeals along the model proposed in 1975 by the Commission on Revision of the Federal Court Appellate System—i.e., a new court to which the Supreme Court could refer cases, such as those presenting conflicts among the circuits, that need national resolution but not necessarily by the Supreme Court.

He also noted the possibility of requiring a court of appeals to sit *en banc* before differing with another circuit court; under this proposal, the first *en banc* decision would become the nationwide rule. Justice Brennan found this to be "a suggestion worth exploring."

Another option suggested by Justice White would build on the national patent review function of the soon-to-be constituted United States Court of Appeals for the Federal Circuit; a single national court could hear district court appeals in other categories, to provide one national intermediate appellate interpretation. More fundamental alternatives, though, are worth considering, he added, such as two Supreme Courts, one responsible for civil and criminal cases, or, alternatively, separate ones for constitutional and statutory cases.

Justice Marshall was critical of one specific aspect of the Court's procedures—to which Justices Brennan and Stevens objected as well: the increasing use of summary dispositions, where the Court announces a decision on the merits without oral argument. Lamenting the Court's use of these unsigned decisions because "they give short shrift to important issues," Justice Marshall cited a *per curiam* opinion, which exemplified a "growing and inexplicable readiness on the part of the current Court to dispose of cases summarily." The Court's rules on petitions for writs of certiorari, he noted, are designed to restrict attorneys to discussion of "the limited issue of certiorari." If the Court continues to rely on summary dispositions, he urged the Court to change its procedures so as to "notify the parties that summary disposition is under consideration and allow them time to file briefs on the merits."

Please refer to "The Source" for information on how to obtain copies of the justices' speeches from the Center's Information Service.

REPORTS from p. 4

Others may request copies by writing to the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005, indicating the report(s) desired. Please enclose a self-addressed, gummed mailing label, preferably franked. (The volume of such requests typically has been so great that it makes it very difficult to process telephone orders, and thus we would appreciate your ordering by mail.) Copies will be shipped to you as soon as possible after the printer delivers them to the Center, probably in late September. Of course, delivery dates are not always as promised, and postal delays cannot be discounted. If you plan to write for a copy, it would help us if you did so promptly.

So They Say...

"Most assuredly the senators and representatives who introduced these [court-stripping] measures did not do so out of a deep and abiding concern that our most basic constitutional guarantees should be even more vigorously enforced than they are now. All of us took an oath to uphold the Constitution, and it would be consistent with that oath to introduce measures in an effort to shore up constitutional guarantees. But clearly, this is not the motivation behind these 30 bills.

"The impetus for these measures is transparent. These measures are intended to weaken our basic constitutional rights and liberties. I can discern no other motivation for them, and none exists."

—Senator Dale Bumpers, speech to the Eighth Circuit Judicial Conference, July 28, 1982.

* * *

"No Federal money has been appropriated for construction of new correctional facilities in fiscal 1981 and 1982. The reason? Myopia has prevented policymakers from anticipating the increased numbers of prisoners created by the trend toward stiffer sentences. Our inability to shift our focus beyond the short run has exacerbated the crisis in prisons...."

"Levels of compensation for judges remain far below those of attorneys with similar experience in private practice, and a young associate in a law firm earns about as much as a federal district judge. Moreover, overall caseloads in federal courts have continued to skyrocket, creating frustration and delay. Four able judges with life appointments voluntarily left the bench last year because of these conditions, thus depriving the public of their wisdom and experience. If Congress proves unwilling to maintain and increase funding for the courts, judicial resignations almost certainly will continue. It will become steadily more difficult to attract the best qualified lawyers to the federal bench. If the strength and independence of the judiciary decline, so will the public confidence in the quality and efficiency of justice. Costs saved by Congress today may be paid in disorganization, turmoil and strife tomorrow."

—Chief Judge Emeritus Irving R. Kaufman (Second Circuit), "The Cost of Justice," *New York Times*, June 20, 1982.

* * *

"The problem of the overload of the federal judiciary is a serious one not only for the federal judiciary as an institution but for the quest for justice itself. We are fast approaching a time—if we have not reached it already—when the litigation burden on the federal court system will overrun the ability of that system to generate a coherent body of law. The current pressure on the federal courts threatens to result in an uncoordinated and inconsistent body of federal law."

—William French Smith, speech to the Ninth Circuit Judicial Conference, July 28, 1982.

* * *

"The more courts attempt either to reflect, with up-to-the-minute accuracy, the will of the people or to ignore that will, as expressed in the laws and constitutions, the more voice in the selection of judges the people will demand and, in due course, get. It is not that courts are not now subservient to the people; my point is that their subservience consists of abiding by that will as expressed in proper constitutional or statutory forms. Neither anticipation of popular will not properly expressed as yet, nor frustration of such will already so expressed, is proper judicial behavior. When both are perceived to be accepted practice, much greater control and accountability will be demanded by the people."

—Judge Joseph T. Sneed, (Ninth Circuit), speech to the National Judicial College, August 6, 1982.

ABA DEFERS ACTION ON PROFESSIONAL RULES

Time constraints and major differences within the ABA House of Delegates resulted in the decision at the August meeting to defer action on the proposed Model Rules of Professional Conduct until the midyear meeting of the ABA next February.

The recommendations embraced in the rules are a culmination of a five-year project of the Commission on Evaluation of Professional Standards (chaired by Robert J. Kutak).

The present Model Code of Professional Responsibility was adopted by the ABA in 1969.

Correction

Because some lines of type were dropped from our August story on Supreme Court law clerks, the names of several law schools where the new law clerks were trained were omitted. The paragraph should have said: Of the thirty-four newly chosen clerks, nine are graduates of Harvard Law, and four are from Yale. Three each are from the University of Michigan, Stanford, and the University of Virginia; two each are from the University of Chicago, Columbia, and Georgetown; and one each is a law graduate of Duke, the University of Missouri, the University of Pennsylvania, the University of Utah, Tulane, and William and Mary.

ABA from p. 5

investigation; require the special prosecutor to adhere to the formal guidelines of the Department of Justice; require the Attorney General to report to state or local prosecutors allegations against covered officials of acts that appear to violate state or local law; and permit, in certain circumstances, a three-judge federal court to appoint a special prosecutor.

- To support twelve amendments to the Racketeer Influenced and Corrupt Organizations (RICO) statute to ensure that its execution is accomplished "with proper regard for due process and fundamental fairness."
- To oppose legislation that would restrict the use of habeas corpus by state petitioners who are challenging their convictions on federal constitutional grounds.

PERSONNEL

NOMINATIONS

Ross T. Roberts, U.S. District Judge, W.D. MO, Aug. 9

Thomas F. Hogan, U.S. District Judge, D. DC, Aug. 10

Edward Rafeedie, U.S. District Judge, C.D. CA, Aug. 24

David D. Dowd, Jr., U.S. District Judge, N.D. OH, Aug. 24

Raymond L. Acosta, U.S. District Judge, D. PR, Sept. 9

James C. Fox, U.S. District Judge, E.D. NC, Sept. 14

CONFIRMATIONS

Antonin Scalia, U.S. Circuit Judge, CA-DC, Aug. 5

Michael M. Mihm, U.S. District Judge, C.D. IL, Aug. 5

William M. Acker, Jr., U.S. District Judge, N.D. AL, Aug. 18

Bruce M. Selya, U.S. District Judge, D. RI, Aug. 18

Harry W. Wellford, U.S. Circuit Judge, CA-6, Aug. 20

Ross T. Roberts, U.S. District Judge, W.D. MO, Aug. 20

Thomas F. Hogan, U.S. District Judge, D. DC, Aug. 20

APPOINTMENTS

Harold M. Fong, U.S. District Judge, D. HI, July 6

J. Lawrence Irving, U.S. District Judge, S.D. CA, July 30

E. Grady Jolly, U.S. Circuit Judge, CA-5, Aug. 2

Patrick E. Higginbotham, U.S. Circuit Judge, CA-5, Aug. 3

Antonin Scalia, U.S. Circuit Judge, CA-DC, Aug. 17

Michael M. Mihm, U.S. District Judge, C.D. IL, Aug. 20

Richard A. Gadbois, Jr., U.S. District Judge, C.D. CA, Aug. [illegible]

Harry W. Wellford, U.S. Circuit Judge, CA-6, Sept. 10

William M. Acker, Jr., U.S. District Judge, N.D. AL, Sept. 13

Ross T. Roberts, U.S. District Judge, W.D. MO, Sept. 9

Jaime Pieras, Jr., U.S. District Judge, D. PR, July 23

ELEVATION

Aubrey E. Robinson, Jr., Chief Judge, D. DC, Sept. 20

Manuel L. Real, Chief Judge, C.D. CA, Sept. 30

SENIOR STATUS

A. Andrew Hauk, Chief Judge, C.D. CA, Sept. 29

DEATH

Hernan G. Pesquera, Chief Judge, D. PR, Sept. 8

ao&fjc calendar

Sept. 27-29	Information Management Workshop
Sept. 28-30	Metropolitan District Chief Judges Conference
Oct. 11-13	Workshop for Judges of the Fifth Circuit
Oct. 18-20	First Circuit Judicial Conference
Oct. 26-28	Workshop for Judges of the Eleventh Circuit

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U.S. Court of Appeals for the Federal Circuit

On October 1, immediately prior to ascending the bench of the new U.S. Court of Appeals for the Federal Circuit, the judges of this court were photographed with the Chief Justice of the United States. Chief Justice Warren E. Burger participated in the ceremonies and will be the Circuit Justice for the new court. The judges in the front row are (l. to r.): Judge Giles S. Rich, Chief Judge Howard T. Markey, the Chief Justice, and Judge Daniel M. Friedman. Judges in the back row are (l. to r.): Judge Shiro Kashiwa, Judge Helen W. Nies, Judge Oscar H. Davis, Judge Philip B. Baldwin, Judge Marion T. Bennett, Judge Edward S. Smith, Judge Jack R. Miller, and Senior Judge Wilson Cowen. Judge Philip Nichols, Jr., and Senior Judge Byron G. Skelton were absent when the picture was taken. One vacancy remains on this twelve-member court.

Committee Recommendations Adopted at September Judicial Conference Sessions

In addition to actions taken on bankruptcy procedures and federal rules revisions (see story, column 3) the Judicial Conference during its September 21-23 meetings adopted various other committee recommendations. The Conference:

- Approved a revised reporting form and instructions for financial disclosure statements. Because of the failure of many reporting individuals to check a box indicating whether their reports included financial information concerning spouses and dependent children, the box will be eliminated in favor of a declarative statement asserting that a report includes reportable information for the reporting individual's spouse and children, if any. The revised form will contain a separate place for reporting capital gains and new instructions to simplify fulfillment of another disclosure requirement that led many individuals to furnish inconsistent data.

See CONFERENCE, page 4

Rules Changes Approved By Judicial Conference

The Judicial Conference of the U.S. at its September meeting approved various amendments to the federal rules of procedure proposed by the Committee on Rules of Practice and Procedure. An unusually large number of proposals have been approved, involving alterations and new practices in civil and criminal procedure. Also, the conference approved a complete new set of bankruptcy rules.

Among the most significant of the proposed changes to the civil rules is the imposition of an affirmative obligation on an attorney to make a "reasonable inquiry" that the new standards set forth in the rule have been met before signing either a pleading or any of the papers relating to discovery and of a mandatory obligation on a judge to mete out sanctions, even *sua sponte*, if necessary, for failure to comply. On the criminal side, Rule 11 has been amended to authorize a conditional plea of guilty or *nolo contendere* and to permit the defendant to withdraw that plea in the event a court of appeals reverses a decision of the trial court on certain pretrial motions. Another important change, to Rule 23, allows the trial judge the discretion of allowing a jury to proceed and render a verdict with only eleven jurors, when a juror is lost during deliberations.

Federal Rules of Civil Procedure

New proposals and the strengthening of existing rules to reduce cost and delay in civil litigation have been debated for several years by practitioners, academics, judges, and justices. Opponents to the proposed rules changes share the goals of the revisors but contend that some amendments may actually increase costs and delay, or may prove ineffective in the case of some changes (as with

See RULES, page 6

Ju 10.3/2:

Overdelegation of Authority, Proliferation of Judges Could Harm the Judiciary, Says Rehnquist

Justice William H. Rehnquist has added his voice to those of five of his colleagues who have spoken publicly in the last two months about the effects on the judiciary and on judging of ever-increasing caseloads and the consequent delegation of once uniquely judicial functions to other judiciary employees.

Justice Rehnquist's September 23 Mac Swinford Lecture at the University of Kentucky focused on the consequences for federal district and appeals courts and state courts, in general. He noted that, although petitions for certiorari processed by the Supreme Court increase every year, the Court has "the luxury of almost total discretionary authority" regarding selection of its cases, the number of which has remained relatively constant in recent years.

While acknowledging the astonishing multiplication both in workload and in judicial personnel, Justice Rehnquist bared the fallacies in widely accepted twin assumptions: first, ever-increasing dockets can be remedied by the addition of more judges; second, the scarcity of time a judge has available for each case does not directly affect the quality of judging, and, therefore, a very busy, even harried, judge can dispense the same quality of justice as one with time for reflection. Regarding the first assumption, Justice Rehnquist declared, even though the number of judges increases, the number of cases per judge increases even more.

One can deduce that Congress accepts the second proposition above, the justice holds, because it has repeatedly added to the burdens of the federal courts by "carv[ing] out a small chunk of traditional state court tort law or domestic relations law, with respect to which there is scarcely conclusive evidence that state courts were not doing a thoroughly adequate job of adjudicating, and turn[ing] it into a federal cause of action." Statutes cited by Justice Rehnquist as illustrative of this "ever-increasing tendency of Congress" are the Federal Child Support Enforcement Act, the Truth in Lending Act, and the Motor Vehicle Information and Cost Savings Act (which allows a civil action to be brought in any U.S. district court, without regard to the amount in controversy, for knowingly operating a motor vehicle with a disconnected or nonfunctional odometer).

Justice Rehnquist expressed grave concern that the continuing proliferation of federal judges could eventually diminish the prestige of the judiciary. To draw well-qualified lawyers into the judiciary in spite of the disadvantages of "the often political nature of the qualifications" and of inadequate judicial salaries, the element of prestige has been essential. "[T]he danger is that if we pile on too many disadvantages or remove some of the advantages, we will eventually be dealing with a pool of lawyers for whom judicial salaries are not a deterrent, because the judicial salary is more than they could make as a lawyer. . . . [A] pool so limited does not offer a promising reservoir for maintaining the present quality of the federal judiciary."

In agreement with those of his colleagues on the Court, particularly Justice John Paul Stevens and Justice Lewis F. Powell, Jr., who had earlier expressed their dismay over the growing bureaucratization of the federal courts, Justice Rehnquist indicated his concerns about increasing delegation of authority to U.S. magistrates, law clerks, court administrators, court executives, and court clerks. Judges' reliance on new mechanisms utilizing these personnel has been essential to get the work of the courts done, but should be employed, Justice Rehnquist cautioned, only "so long as the judge remains in charge, . . . not merely of the court as a whole, but of the disposition of each case that is before him." A greater shift of the judging function could result in "opinion writing bureaus" like those used by many federal agency commissioners, who "decide an issue before them, and summon one or more members of the 'opinion writing bureau' to write an opinion justifying the result they have reached." ■

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Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

Attorney General Cited

For noncompliance with the court's February 12, 1982, order to pay a $3,000 attorney's fee award, Attorney General William French Smith was held in contempt of court by U.S. District Judge William P. Gray (C.D. Cal.) on September 29, 1982, and ordered to pay a penalty of $100 for every day payment was in arrears. A little over three weeks later, following the Ninth Circuit Court of Appeals' dismissal of the government's appeal, attorney for the prevailing petitioner in the case received a U.S. Treasury check for $3,000.

Now, attorney Stanley Fleishman's plan is to bring a further court action to recover costs incurred in collecting the award owed him by the government. The case in which his client had prevailed against Smith, the Department of Justice, and other federal administrative agencies was *Paralyzed Veterans of America v. William F. Smith* (Docket Number 79-1979-WPG), involving the obligation of federal agencies to promulgate regulations construing their statutory obligations to prohibit discrimination against handicapped persons by recipients of federal financial assistance. ■

New FJC Publications on Jury Selection Procedures & Summary Jury Trial Techniques

The Federal Judicial Center has recently published *Jury Selection Procedures in United States District Courts.* This publication is part of the Center's Education and Training Series and was produced by Gordon Bermant, currently director of the Center's Division of Innovations and Systems Development. It describes the voir dire and jury challenge practices of six highly experienced federal district judges. Copies may be requested as described below.

Voir dire and jury challenge practices can be said to consist of seven steps—the oath to the venire, the judge's address to the panel, the questions put to the panel, rulings on challenges for cause, the exercise of peremptory challenges, the selection of alternate jurors, and the judge's final comments prior to the clerk's administration of the oath.

Jury Selection Procedures describes these steps and some of the variations that the six judges bring to each. Although they do not cover the gamut of federal practice, and do not indicate the range of state voir dire and jury challenge methods, the variations demonstrate the considerable discretion the district court has to tailor these practices to its individual preferences or traditions. Differences in practice can affect interactions among court personnel, counsel, and panelists.

Six appendixes to the report include standard voir dire questions, a questionnaire to expedite voir dire, and recommendations for the conduct of the voir dire examination and jury challenges.

* * *

The "summary jury trial" is a method developed by Judge Thomas Lambros of the Northern District of Ohio to facilitate pretrial determination of cases in which the significant barrier to settlement is disagreement between the attorneys or parties regarding a jury's likely findings on liability or damages in the case. Given the interest in possible alternatives to traditional litigation procedures, and at Judge Lambros's invitation, the Center undertook a modest analysis of this technique.

Summary Jury Trials in the Northern District of Ohio reports the result of that analysis. It was prepared by M. Daniel Jacoubovitch, formerly of Kent State University and now of the Center's Division of Innovations and Systems Development, and Carl M. Moore, of Kent State. Copies may be requested as described below.

When the judge determines that a case may be appropriate for a summary jury trial, a six-member panel is selected from the court's jury pool, and the proceeding is presided over by a judge or magistrate. Each attorney is given one hour to describe to the jury his or her party's view of the circumstances of the action, after which the judge or magistrate delivers a brief statement of the applicable law and the jury retires to deliberate. Evidentiary rules are few and flexible. After the consensus verdict—or, if that is not possible, the jury's "special report"—is returned, counsel meet with the judge or magistrate to discuss the result and to establish a timetable for settlement negotiations.

The report, based on extensive interviews and an analysis of all cases assigned to summary jury trial during a specified period, describes the views of the participants and suggests several conclusions, generally favorable to the effectiveness of the procedure. The authors recommend the continuation of the summary jury trial procedure, but suggest the formulation of a fairly narrow "profile" of cases suitable for routine assignment to it: only single defendant/single plaintiff cases should be included, and cases in which the truthfulness of an individual witness's testimony is a central issue should be excluded.

* * *

To receive a copy of either of these publications, please write to the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed mailing label, franked if possible. (The volume of such requests is typically so great that it is very difficult to process telephone orders.) If you plan to write for a copy, it would help us if you did so promptly. ■

Pretrial Services Expand, Drug Aftercare Program to Continue Temporarily

In the whirlwind of legislative action in Congress during the last week before its preelection recess, pretrial services agencies were given a new lease on life. Legislation signed by the president on September 27 not only accedes to the A.O. director's recommendation that the ten existing pilot agencies continue, but also authorizes establishment of pretrial services agencies in all judicial districts.

The Drug Aftercare Program, however, which had passed in the House of Representatives on October 26, 1981, did not fare as well in the closing days of this Senate session. Following the tacking of the Violent Crime and Drug Enforcement Improvement Act of 1982 (S. 2572) to the drug program bill, the package of legislation failed to pass. Thus, the director of the A.O. had no alternative but to suspend the operation of the Drug Aftercare Program, effective October 1, 1982. Following cessation of contract programs, the House and Senate Judiciary Committees informed the director that the continuing resolution adopted on October 1, 1982, and extending through December 1982 (P.L. 97-276), not only provided the necessary funding for the government to continue operation, but also provided the necessary authorization to continue the Drug Aftercare Program. As a result, the director reactivated the Drug Aftercare Program on October 20, 1982, through the duration of the continuing resolution.

If the lame-duck session of Congress scheduled to convene November 29 does succeed in passing the Drug Aftercare legislation, contract programs will be continued through FY 1985. ■

CONFERENCE, from page 1

As of September 27, the Committee on Judicial Ethics had received 1,858 reports for the calendar year 1981 from judicial officers and employees. After review by committee members, the committee had written 1,200 letters to reporting individuals regarding errors, many of which were minor, and inconsistencies in their declarations. The volume of correspondence continues to increase.

- Asked Congress for twenty-two new judgeships for the courts of appeals, forty-three for district courts, eight temporary district judgeships, and conversion to permanent status of two temporary district judgeships. These totals include requests for new judgeships pending since 1980, following the first biennial survey of judgeship needs.

- Authorized eight additional full-time federal magistrates, the conversion of two part-time positions to full-time status, and one part-time position. For the Probation Office, the Conference voted to request funds for thirty additional probation officer positions and eighteen additional probation clerks.

- Approved a revised schedule, proposed by the Ad Hoc Committee on the Disposition of Court Records, for the retention of records of the courts of appeals, the district courts, the bankruptcy courts, circuit judicial councils, circuit judicial conferences, and other federal courts. The National Archives and Records Service has approved the new schedule, as is required before it can become effective on January 1, 1983. The Archivist of the U.S. had previously placed a moratorium on destruction of court records pending adoption of a records disposition program that would pass muster with the federal judiciary, with clerks of court, who are responsible for the transmission of records to Records Centers, and with historians and historical societies concerned about possible losses of valuable court records.

Addendum

In last month's story about the selection of three new Judicial Fellows, Justice Sandra Day O'Connor was included in the list of Judicial Fellows Commission members. In fact, because of her pressing schedule, Justice O'Connor resigned from the commission prior to the final selections. She was replaced by Judge Cornelia Kennedy of the Sixth Circuit, who will serve a three-year term.

A first set of revisions to the original schedule, issued in June 1980, was made by the committee in February 1982 and included: elimination of the requirement for circuit archives history committees, and simplification of the procedures for preparing records for shipment.

Additional revisions approved by the Judicial Conference include: the designation as "permanent" of records of special prosecutors appointed by courts of appeals; and addition of a provision for machine-readable docket sheets and case indices from district courts. Revisions have also been approved regarding bankruptcy records, requiring permanent retention of all bankruptcy files containing judgments and orders affecting title to property, all bankruptcy adversary proceeding files terminated during or after trial, and all bankruptcy judgment and order records separately maintained.

Issues remaining to be studied and resolved pertain to Federal Public Defenders' records and to advances in electronic recordkeeping, such as the mechanics of selecting and transferring machine-readable records to NARS and other questions expected to arise from courts' computerized data banks.

- Approved the transmission to Congress of a draft bill to broaden the definition of "smuggling" in 18 U.S.C. §545 to make it unlawful to smuggle, clandestinely introduce, or transport with intent to smuggle or clandestinely introduce into the U.S. any merchandise that should have been invoiced. The Court of Appeals for the First Circuit in its decision in *United States* v. *Lespier*, 601 F.2d 22 (1st Cir. 1979), involving the interception in U.S. territorial waters of a vessel carrying non-invoiced cargo, had had to follow precedent of the 1899 Supreme Court ruling in *Keck* v. *United States*, which held that the offense of smuggling is not complete until the merchandise has been landed on shore.

CALENDAR

Nov. 15 Judicial Conference Advisory Committee on Appellate Rules
Nov. 15-16 Judicial Conference Subcommittee on Judicial Statistics
Nov. 17-19 Seminar for Bankruptcy Judges
Nov. 29-Dec. 1 Seminar for Magistrates
Dec. 7-8 Judicial Conference Subcommittee on Federal Jurisdiction
Dec. 9-10 Judicial Conference Subcommittee on State-Federal Relations
Dec. 13-15 Seminar for Newly Appointed Federal Appellate Judges
Dec. 16-17 Judicial Conference Subcommittee on Judicial Improvements

(The chief judge of the First Circuit, Frank M. Coffin, recently explored the subject of anachronistic statutes on a theoretical plane in a review of Guido Calabresi's new book, *A Common Law for the Age of Statutes*. Coffin, "The Problem of Obsolete Statutes: A New Role for Courts?" 91 *Yale L. J.* 827 (March 1982).)

- Approved the transmittal to district judges of a *Judges' Manual for the Management of Complex Criminal Jury Cases*, prepared by a subcommittee, headed by Judge John Feikens (E.D. Mich.) and composed of various members from the Committee on the Operation of the Jury System and the Committee on the Administration of the Criminal Law. The A.O. is distributing copies to all district judges.

- Approved legislation to set up a temporary study commission to study the future of the judiciary. ■

Almost All Haitian Detainees Released Following Judge Spellman's Order

The Immigration and Naturalization Service reported on October 22 that all but seven of the 1,768 illegally entered Haitians being detained in Bureau of Prisons institutions and INS detention facilities have been released from custody.

On June 29 Judge Eugene Spellman (S.D. Fla.) had ordered the release of most of the detained Haitians, most of whom were confined in Miami and in Puerto Rico. Others were detained in New Orleans and Brooklyn facilities. Subsequently, 1,537 detainees were released in conformance with Judge Spellman's order. Another 224 individuals, who were not covered by Judge Spellman's order, were nevertheless paroled by the Justice Department "for humanitarian reasons." Under 8 U.S.C. §1182(d)(5)(A) the "parole of aliens" by the Attorney General is allowed while their requests for admission are pending.

To comply with Judge Spellman's conditions for release, a complicated processing procedure by INS had to be performed and a sponsor in the community found for each detainee. In some cases these were relatives, in others unrelated individuals and families in the community, and in still others churches and church organizations. The sponsors have agreed to help each Haitian learn English and find a job, and to report to an independent third party once weekly that they have had contact with the alien during the week. Each detainee was also to be given the opportunity to be represented by counsel at his or her hearing if s/he could secure the services of an attorney. Thus, the *pro bono* services of a small army of lawyers were needed. The ABA helped, and so did the American Immigration Lawyers Association. When appeals went out to the local bar, over 300 volunteers signed up to help at one point. "Judge Spellman assisted us greatly in that regard," says Neal Sonnett, chairman of the Dade County Bar Association Haitian Refugee Volunteer Task Force, and inspired many attorneys who had read an open letter by the judge in the local bar journal. Sonnett was particularly pleased at the response "in view of the fact that the field of immigration law is so specialized."

Notwithstanding the large offering of *pro bono* services, more attorneys are still sought to provide counsel to Haitians. ■

Theodore Lidz Elevated to Chief of A.O.'s Criminal Justice Act Division

Theodore J. Lidz, who has been assistant chief of the A.O.'s Criminal Justice Act Division for over six years, has been appointed chief of the division. He succeeds Norman Lynch, who resigned to become an administrative law judge.

Mr. Lidz, who received his J.D. degree from Wayne State University in 1970, came to the Administrative Office in 1976 after briefly serving as an Assistant Federal Public Defender in the District of Connecticut. Prior to joining the federal judiciary he was deputy attorney in charge of operations at the Legal Aid Society in New York City.

During 1973 and 1974 Mr. Lidz held the position of general counsel and chief of court planning in New York City's Criminal Justice Coordinating Council.

The CJA Division administers the program for the appointment of counsel under the Criminal Justice Act (18 U.S.C. §3006(A)). The division provides advice and assistance to the Criminal Justice Act Committee of the Judicial Conference of the U.S. and administers the Federal Defender Program, comprising more than fifty law offices throughout the country. The work of this division also calls for providing legal advice, on behalf of the General Counsel, on issues related to the Criminal Justice Act. ■

PERSONNEL

Nomination

George C. Fagg, U.S. Circuit Judge, 8th Cir., Sept. 22

Confirmations

Edward Rafeedie, U.S. District Judge, C.D. Cal., Sept. 22
David D. Dowd, Jr., U.S. District Judge, N.D. Ohio, Sept. 22
Raymond L. Acosta, U.S. District Judge, D. P.R., Sept. 29
James C. Fox, U.S. District Judge, E.D. N.C., Sept. 29
George C. Fagg, U.S. Circuit Judge, 8th Cir., Oct. 1

Appointment

Thomas F. Hogan, U.S. District Judge, D. D.C., Oct. 1

Elevations

Juan R. Torruella, Chief Judge, D. P.R., Sept. 8
L. T. Senter, Jr., Chief Judge, N.D. Miss., Sept. 20
Walter L. Nixon, Jr., Chief Judge, S.D. Miss., Sept. 24
Robert I. Teitelbaum, Chief Judge, W.D. Penn., Sept. 24
Robert L. Taylor, Chief Judge, E.D. Tenn., Sept. 29

Position Available

Federal Public Defender Middle District of Florida, residence in Tampa, Fla. This official supervises a staff of eleven, variously located in Jacksonville, Orlando, and Tampa. Salary is $51,750. Requires law degree, membership in a state bar, and a minimum of five years experience, preferably in federal courts. Position available January 7, 1983. Closing date for applications: December 15, 1982. Submit to: Donald M. Cinnamond, Clerk, U.S. District Court, P.O. Box 53558, Jacksonville, FL 32201.

EQUAL OPPORTUNITY EMPLOYER

RULES, from page 1

amendments to Rules 11 and 26), or prove too sweeping as to others (as in new requirements for scheduling orders in Rule 16). Following committee sessions and public hearings, the Judicial Conference has elected to go ahead with the committee's proposals.

Under the various rules' enabling acts, the rules go now to the Supreme Court, and if approved by the Court, to Congress. Unless Congress acts to modify or reject the proposed revisions and new rules within ninety days of receiving them, the rules will become effective.

Proposed amendments to Rules 7(b) and 11, 26(a) and (b), and new Rule 26(g), all of which are designed to reduce abuses in discovery and in the abuse of motions, pleadings, and other papers, promise to produce great impact.

Changes to Rule 26 address the widespread view that unnecessary costs and delays are caused by redundant, excessive, and duplicative discovery practices. The rule would encourage judges to control the use of the various discovery devices. While primary responsibility for conducting discovery continues to rest with litigants, courts are directed both to deter discovery abuses by imposing a certification requirement on attorneys—his or her signature to warrant that the attorney has made a reasonable inquiry into the factual discovery request, response, or objection—and by requiring the imposition of sanctions on attorneys who fail to meet the standard. New aspects of Rule 26, regarding discovery, parallel proposed changes in Rule 11, regarding motions and papers, but, because discovery requests, responses, and objections are usually more specific than motions and papers, the elements required for certification in new Rule 26(g) are also more specific than those in Rule 11.

Position Available

Circuit Executive, U.S. Court of Appeals, Eleventh Circuit, Atlanta, Georgia. Duties comprise a broad range of tasks related to circuit business, including relationships with the circuit, district, and bankruptcy courts, and the circuit judicial council. Salary up to $57,500, depending on education and experience. Requires proved management and administrative skills, and experience in judicial administration. Degree in management or related field; advanced graduate and/or legal training desirable. Certification by the Board of Certification is a requirement; but qualified individuals are encouraged to apply, whether or not they are currently on the certified list. Send resume to Thomas H. Reese, Room 340, 56 Forsyth Street, N.W., Atlanta, GA 30303, by December 1, 1982.

EQUAL OPPORTUNITY EMPLOYER

Rule 26(b)(1)(iii) also introduces the principle of "proportionality" into the rules. As an additional method of facilitating the court's control over discovery and of preventing a deep-pocketed litigant from wearing down a financially weaker opponent, the attorney is required, in effect, to certify the appropriateness of the discovery in light of such factors as "the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake."

Amended Rule 7 incorporates the certification standards for attorneys and sanctions against improper motion and pleading practice, which are explicitly set forth in amended Rule 11. While Rule 11 has always provided for the striking of pleadings and motions and for the use of disciplinary sanctions to check abuses in these areas, the rule was essentially ineffective. Now the rule will impose an affirmative standard for attorneys' conduct in particular, by requiring that the attorney or party warrant by his signature to each pleading, motion, motion for discovery, or response to a request that the paper filed is made after reasonable inquiry that it is well grounded in fact, is warranted either by existing law or a good faith argument for a change in existing law, and "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." According to the Advisory Committee Note accompanying the proposals, confusion has resulted from the previous provisions for sanctions in Rule 11, particularly as to which circumstances triggered the striking of pleadings or motions or the imposition of disciplinary actions for abuses in these and related areas, and also as to the range of appropriate sanctions available, which now expressly include an order to pay the other party's expenses incurred because of the filing of the paper, including the attorney's fee. The committee hopes that the new rule will reduce judges' reluctance to impose sanctions. The language—"the court, upon motion or its own initiative, shall impose . . . an appropriate sanction"—is designed both to encourage judges to take disciplinary action against attorneys and to ensure the judges' role in "securing the system's effective operation."

Rule 16, which is undergoing its first revisions since promulgation of the F. R. Civ. P. in 1938, is intended to reform procedures for pretrial conferences and for the scheduling and management of litigation. The revisions encourage use of pretrial conferences to set up scheduling and case management by trial judges, but also allow for a scheduling order to be issued after consultation with the parties by "a scheduling conference, telephone, mail, or other suitable means." Rule 16(b) sets out a mandatory scheduling order, requiring that the order be issued within 120 days after the summons and complaint are made, but allows for exceptions authorized by local district court rule. The Advisory Committee Note suggests such areas for exception by local rule as social security cases, habeas corpus petitions, forfeitures, and certain administrative action reviews. Rule 16, too, imposes upon the court

See RULES, page 7

RULES, from page 6

the obligation to impose any of the sanctions listed in Rule 37(b)(2) on a party or attorney who fails to comply with the rule's explicit requirements in four specified situations.

Changes to Rules 53 and 72 through 76 involve the roles of federal magistrates. An amendment brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some "exceptional condition" requires the reference. In other respects also, this rule and Rules 72 through 76 conform the F. R. Civ. P. to the 1979 amendments to the Federal Magistrates Act.

Three changes have been proposed for Rule 67. The first would allow a litigant in an action where any part of the relief sought is a money judgment or disposition of money or a transmittable object to deposit with the court a sum of money or a thing, whether or not that party claims an interest in the sum or thing. The second modification sets up a procedure requiring the order of deposit to be served on the clerk of court. Finally, the rule now requires that the deposit shall be either placed in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

Federal Rules of Criminal Procedure

Several proposed changes to Rule 6 of the Federal Rules of Criminal Procedure involve secrecy and disclosure of grand jury proceedings. An amendment to Rule 6(e)(3)(C) allows an attorney for the government to disclose matters occurring before one grand jury to another federal grand jury, a procedure not covered by rule but consistent with current practice. Rule 6(e)(3)(D) requires that a petition for disclosure of grand jury proceedings for use in civil proceedings in another district be filed in the district court supervising the grand jury; the proposed rule also requires the petitioner—unless the hearing is *ex parte*—to serve notice of the petition on interested parties (including the government's attorney), who also shall be ensured an opportunity to appear and be heard, and on other persons as the court determines.

Proposed Rule 6(e)(3)(E) provides for a petitioner or intervenor in a proceeding in a federal court to seek transfer of material sought to be disclosed from the federal court having custody of the grand jury material. The supervisory court will make transfer unless it can discover enough about the proceeding to determine whether disclosure is proper, and the transfer will be accompanied by a written evaluation of the need for continued grand jury secrecy.

Other revisions affecting grand juries include a requirement (Rule 6(e)(5)) for a court to close, in whole or in part, hearings dealing with matters affecting a grand jury with respect to a pending or ongoing investigation. The objective is to protect against disclosure of past grand jury matters and of witnesses' identities, targets, the subject matter of their expected testimony, and of proceedings to decide whether or not to grant immunity to a grand jury witness.

New Rule 6(e)(6) would provide for records, orders, and subpoenas relating to grand jury proceedings to be kept under seal to the extent, and as long as, necessary to prevent disclosure of such matters. In addition, changes to Rule 6(g) allow a six-month extension, if it is in the public interest, to be added to the former eighteen-month limit on service of a grand jury.

A significant change to the criminal rules is the addition to Rule 11 of a provision that would permit the entry of a conditional plea of guilty or of *nolo contendere*. The addition to Rule 11(a) would allow the defendant the option of entering, with the court's approval and the government's consent, such a conditional plea, and to reserve in writing the right to appeal an adverse judgment of a specified pretrial motion. Previously, the denial of defendant's pretrial motions would normally not be appealed unless the defendant went through a full trial. Only two circuits had permitted the entry of a conditional plea. The new provision avoids the necessity for trials undertaken for the sole purpose of preserving pretrial objections, and thus conserves prosecutorial and judicial resources.

New Rule 11(h) makes it clear that the "harmless error" doctrine is applicable to Rule 11, which sets out procedures for the taking of pleas. An Advisory Committee Note explains that, while "thoughtful and careful compliance" to Rule 11 by trial judges is still required, no automatic reversal will result from a variance that does not result in a manifest injustice.

Another important change would modify Rule 23, to allow a court the discretion to consider a verdict of eleven jurors valid when a juror has to be excused for just cause after jury deliberations have begun and it is too late to substitute an alternate. By thus interpreting the Sixth Amendment as not prescribing the precise number of persons that can constitute a jury, the Conference approved a course of action other than mistrial for lengthy, complex trials where a jury loses a member after it retires. A judge will still have the option of declaring a mistrial rather than to permit deliberations to continue with fewer than twelve jurors.

Other proposed amendments would add Rule 12(i), applying Rule 26.2 to a hearing on a motion to suppress evidence, and allowing for excision as privileged matter portions of a law enforcement officer's testimony; amendments to Rule 12.2(b) through (e), broadening the motion requirement of 12.2(b) so as to permit the government time for adequate preparation and to obviate delays, allowing for "mental" examinations other than by a psychiatrist, broadening Fifth Amendment protections against use of defendant's statement taken during a mental examination or its "fruits" unless on an issue introduced by the defendant.

The Conference also proposed changes affecting disclosure of pre-

See RULES, page 8

RULES, from page 7

sentence report information. A new Rule 32(a)(1)(A) would oblige a sentencing judge to determine that the defendant and his attorney have had an opportunity to read the presentence investigation report (excluding the probation officer's recommendation as to sentence, and any information deemed potentially harmful to the defendant or any other person), or in specified circumstances, a summary of the excluded information, regardless of whether the defendant or attorney requested it. Rule 32(c)(3)(A), (B), and (C) would be changed to reflect the foregoing new paragraph, and to require disclosure of the presentence report a reasonable time before sentencing. Also, a substitute for Rule 32(c)(3)(D) would require the sentencing court, when a defendant or his attorney challenges the accuracy of any fact in the presentence report, either to make a finding on the accuracy of the challenged proposition or to determine that the challenged proposition will not be relied upon at time of sentencing, and to include these findings along with the report later made available to the Bureau of Prisons or the Parole Commission. The rule retains provisions assuring that whatever presentence investigation materials are provided the defendant and his attorney will also be provided to the government; and the government will also have an equal opportunity to speak to the court.

Changes have also been proposed for Rule 32(d) to clarify the standards and the authorities, according to the timing of the motion, for a withdrawal of a plea of guilty or *nolo contendere*. Also, an amendment to Rule 35(b) answers affirmatively the question of whether a court may reduce a sentence within 120 days after revocation of probation when the sentence was given earlier but execution of the sentence had been suspended.

Bankruptcy Rules

In addition, a completely new set of Bankruptcy Rules and Official Forms, consisting of nearly four hundred pages of text, has been presented by the Judicial Conference to the Supreme Court for its approval prior to transmittal to Congress. The Committee on Rules of Practice and Procedure has said that it does not believe that legislation that Congress may soon enact, in order to rectify those areas of the Bankruptcy Reform Act recently held by the Supreme Court to be unconstitutional, will seriously affect the new rules. The rules do not alter or affect the jurisdiction of the bankruptcy courts. Certain technical changes may be required at a later date, however, to conform the rules with whatever action Congress takes.

Proposals Deferred

The Judicial Conference also received notification by the Committee on Rules of Practice and Procedure that it had deferred action until the committee's next meeting in winter 1983 on proposals that had earlier been circulated to the bench and bar for their consideration and on which it had held hearings. Deferred were proposals to amend F. R. Crim. P. Rule 41, on search and seizure, to authorize federal probation officers to apply for search warrants and to add new F. R. Crim. P. Rule 43.1, to broaden judges' discretion to close courtrooms to the press and the public during certain pretrial proceedings. In another kind of action, the Conference accepted the committee's recommendation to abrogate F. R. Crim. P. Rule 58, regarding use of official forms, and all of the forms themselves, as obsolete. ■

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THE THIRD BRANCH

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DEPOSITORY 376

Electronic Recording as Court-Reporting Method Undergoes Testing by Center

The Federal Judicial Center has begun a congressionally mandated experiment to test the feasibility of using electronic sound recording as an official court-reporting method in U.S. district courts.

The Federal Courts Improvement Act of 1982, signed by the president on April 2, amends a portion of the court-reporting statute (28 U.S.C. § 753 to allow the use of "electronic sound recording or any other method" as an official court-reporting method, subject to new regulations that the Judicial Conference may promulgate. The amendment does not mandate the use of electronic sound recording. It merely broadens the number of official court-reporting methods from which district judges may select. Use of electronic sound recording, like other methods, will be subject to the "discretion and approval" of each judge.

That amendment, however, may not take effect until the Judicial Conference regulations become effective. Those regulations, in turn, may not go into effect prior to October 1, 1983. The act further directs the Judicial Conference, during the year after enactment, to "experiment with the different methods of recording court proceedings." The Judicial Center, with the assistance of the Administrative Office, has undertaken that experiment on behalf of the Judicial Conference.

The legislative revision was stimulated by a General Accounting Office study asserting that use of electronic sound recording could achieve significant savings without sacrificing the quality of the federal district court reporting function. Senator Robert Dole, chairman of the Senate Judiciary Subcommittee on Courts,

See RECORDING, page 5

FJC to Support Judges at Summer 1983 Law School Programs

The Center will sponsor attendance by federal circuit and district judges at programs of instruction—scheduled this summer at the Harvard, Columbia, Brigham Young, and Northwestern University law schools. This expanded program was approved by the Center's Board at its most recent meeting.

The program at the J. Reuben Clark Law School at Brigham Young University was designed by the Center and the school as an experimental program, for a limited number of federal judges only.

Federal judges attending any of these programs will be charged no tuition, and the Center will meet judges' travel and subsistence expenses.

The first and last days of classes for each of the programs are:

Brigham Young: June 27-July 1
Columbia: June 6-17
Harvard: July 11-23
Northwestern: June 13-24

Participants should plan, if possible, to arrive for registration the day prior to the start of classes.

The Harvard, Columbia, and Northwestern programs will each offer federal judges a range of courses, which will be taught by their respective faculties. The program at Brigham Young University, to be presented by a combination of Clark Law School faculty and visiting professors, will deal exclusively with federal

See PROGRAMS, page 6

New Records for Filings, Case Dispositions, Again

Although U.S. courts of appeals docketed another record number of appeals, or 27,946, for the year ending June 30, 1982, the circuit courts also terminated 27,984 cases, resulting in the first decrease in pending caseload (10.2 percent reduction) in twenty-four years. The reduction was achieved in spite of a 6 percent increase in appeals filed. This was also the first year that filings for each authorized three-judge circuit panel exceeded 600, the average for each panel for the twelve-month period reaching 635 appeals. These figures are noted in the *1982 Annual Report of the Director* of the A.O. and were presented to the Judicial Conference of the U.S. at the commencement of its September meetings.

During the same twelve months, civil filings in the U.S. district courts tallied a new record 206,193, a total 14.3 percent higher than the figure for the corresponding 1981 time period. Averaged among the 515 authorized district court judgeships, the total represents four hundred cases for each judgeship, fifty cases above the average one year earlier. Although district judges terminated 6.5 percent more civil cases than in 1981, the pending civil caseload totaled 205,434, almost 9 percent more than the number pending in 1981.

Chief categories responsible for increases in district court filings were: cases filed by the U.S. government to recover defaulted student loans and veterans' benefits overpayments (representing a 65.5 percent increase in 1982 over 1981), causing an overall increase of 30 percent in U.S.-as-plaintiff suits; a 31 percent increase in social security filings, resulting in an overall 11 percent rise in U.S.-as-defendant cases; a 23.1 percent in-

See INCREASES, page 2

Ju 10.3/2:

Equal Access to Justice Attorney Awards Are Few in Act's First Nine Months

During the first nine months that the Equal Access to Justice Act was in effect, October 1, 1981, to June 30, 1982, private parties prevailing against the United States, a federal agency, or an official acting in his official capacity filed thirty petitions in federal courts for attorneys' fees and other expenses under provisions of the act. The act, Public Law 96-481, codified as 28 U.S.C. § 2412, authorizes an administrative agency or court to award to ultimately prevailing private parties attorney fees and other costs, such as those for expert witnesses and work required to build a case, for administrative agency adjudications, non-tort civil actions, and/or subsequent court reviews of those findings. A plaintiff must meet certain financial requirements to be eligible for such an award; the government must be unable to show that its position was "substantially justified"; and no special circumstances making an award unjust may exist.

The A.O. is charged under the statute with keeping statistics on Equal Access to Justice Act awards, and with reporting these annually to Congress. The following data are derived, in the main, from the first annual report, dated September 22, 1982.

Of the thirty petitions for attorney and other fees, seventeen requests were denied: fourteen because the government's position was demonstrated to be "substantially justified," and three because of the existence of special circumstances that would make an award unjust.

Of the $683,518 awarded to the remaining thirteen petitioners, $635,999 was awarded to petitioners in two cases. In the larger of these, a class action on behalf of deaf and hearing-impaired citizens, the Greater Los Angeles Council on Deafness, Inc., was awarded $435,999 after prevailing against the U.S. Department of Education, the Department of Health and Human Services, the Federal Communications Commission, and the Department of Justice. Plaintiffs in that case had brought an action under the Communications Act and the Rehabilitation Act, as amended, to compel those agencies to promulgate regulations required under these statutes to make public television stations accessible to the hearing-impaired. The second largest award, $200,000, was ordered for attorney fees for A. Ernest Fitzgerald, the well-known, high-level executive in the Department of the Air Force, whose job was abolished following his reports to superiors about C-5 cargo plane cost overruns. Fitzgerald prevailed in an appeal against a ruling by the then-Civil Service Commission, which had rejected Fitzgerald's charge that the Air Force had not placed him in a comparable position to the one he had lost, as ordered in a previous decision.

Among the eleven other petitions that were successful, six involved the Internal Revenue service and totaled $21,568. Suits against the Department of Health and Human Services, excluding the one cited above, totaled $7,120. A plaintiff against the Department of Labor was granted an award of $12,930, and another received a $5,901 award against the Government Printing Office. ■

THE THIRD BRANCH
BULLETIN OF THE FEDERAL COURTS

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INCREASES, from page 1

crease in employment discrimination cases; a 25.9 percent increase in bankruptcy appeals to district courts; a 22 percent rise in foreclosures; and a 16.7 percent increase in trademark cases and 15.2 percent rise in copyright filings.

Categories of civil filings that decreased in 1982 were: land condemnation cases (by 51.6 percent); fraud cases, including truth-in-lending (by 21 percent); and antitrust cases (by 21.2 percent) filed by both private parties and by the U.S.

Criminal cases filed in district courts also rose, totaling 32,682, or an average of 63 new cases for each district judge. The total number of cases filed, terminated, and pending all increased, almost in lockstep. Percentage increases for 1982 represented 4.5 percent, 5.5 percent, and 5.1 percent higher figures than the totals a year before. The higher totals resulted from increased prosecutions in most major offense classifications, of which the highest were: marijuana prosecutions (up 39.9 percent), with other drug violations up 11.5 percent; weapons and firearms violations (up 36.2 percent); forgery and counterfeiting prosecutions (up 17.6 percent); and auto theft cases (up 21 percent).

The overall percentage increase in bankruptcy filings for 1982 was 1.7 percent. The number of estates involved—527,811—exceeded 1981's record year, in which 43.8 percent more estates were in bankruptcy than the prior year. About 15 percent of these—77,503—were business bankruptcies, while 85 percent—449,839—were non-business bankruptcies. The largest jump was seen in an 84.6 percent increase in Chapter 11 cases, from 8,785 in 1981 to 16,215 in 1982, and there was also a 12.6 percent increase in Chapter 13 cases, from 128,281 to 144,444. The number of Chapter 7 bankruptcies decreased by 3.9 percent, from 381,996 to 367,141 cases. U.S. bankruptcy courts closed 28.3 percent more estates than during last year; nevertheless 732,871 bankruptcy estates were pending on June 30, 1982. ■

Drug Aftercare Program Assessment by FJC

An advisory panel to assist the FJC in the evaluation of the Contract Services for Drug Dependent Federal Offenders Program recently held its first meeting at the Center. The Center has undertaken a multiphased evaluation of the federal drug aftercare program at the request of the A.O.'s Probation Division, to comply with a requirement of 18 U.S.C. § 4255 that the A.O. provide Congress with an evaluation of the program.

Members of the newly appointed panel are: Lee Sechrest, director, Center for Research on Utilization of Scientific Knowledge (CRUSK), University of Michigan; Richard Larson, director, Operations Research Center, Massachusetts Institute of Technology; Steven West, department of psychology, Arizona State University; Don Savage, chief U.S. probation officer, Middle District of Tennessee; Richard Mallard, U.S. probation officer, Northern District of Texas; and Kevin O'Brien, program manager, A.O. Office of Management Review.

Working with the advisory panel and an outside contractor, Macro Systems, Inc., the Center expects to complete the design phase of the impact evaluation before the end of 1982, with implementation of the study to begin in early 1983.

For the first phase of the Center's evaluations, data on the initial operation of the aftercare program were gathered from ten districts: California Central, Texas Southern, New York Southern, Illinois Northern, Indiana Northern, Maryland, Michigan Eastern, Missouri Western, Nebraska, and New Jersey. In addition to conducting interviews with various judges, probation officers, regional commissioners from the U.S. Parole Commission, and parole hearing examiners, case files of 1,356 offenders in the aftercare program were analyzed.

Results of the first phase of the evaluation will appear in an FJC publication scheduled for production next year. ■

Pictured above are members of the FJC advisory aftercare panel along with project staff from Macro Systems, Inc. Standing (l. to r.) are: Steve West, Lee Sechrest, James Eaglin (FJC Project Director), Richard Larson, James Ross (Macro), Albert Audette (Marco). Seated (from l. to r.): Don Savage, Richard Mallard, John Williams (Macro), and Kevin O'Brien.

Closed Loop Antennas for Hearing-Impaired Installed in District Court of Maryland

While the three new courtrooms and judges' chambers for the U.S. district court in Maryland were under design, representatives of Baltimore's hearing-impaired community asked court officials to consider installation of amplification equipment in the public areas. As a consequence, reports Clerk Paul R. Schlitz, the new facilities, now under construction, include closed loop antennas for persons with hearing disabilities. The antenna is connected to the courtroom's public address system, and will enable individuals wearing hearing aids to turn a switch and receive in their hearing aids the transmission of material that is amplified through the public address system. (Hearing aids in this situation operate in a manner similar to receivers frequently available for use in art galleries, where radio frequency transmissions allow reception by receiver-users of instructional materials when users are in close proximity to amplified recordings.)

"This is a relatively simple and inexpensive device to construct in a courtroom or in any type of hearing or assembly room," says Mr. Schlitz. The electrical subcontractor in charge of installing the closed loop system places the cost of the equipment at about $1,200 per courtroom. The total cost of the new facilities is expected to be approximately $1,300,000.

"It's a significant step forward in providing access for hard-of-hearing people," says Sy DuBow, director of the National Center for Law and the Deaf. David Saks, founder of the nonprofit, totally volunteer Organization for Use of the Telephone, Inc., who brought the proposal to the district court, hopes that implementation of such induction loop systems will spread through the federal courts and perhaps also be adopted in state systems. Subsequent to Maryland state hearings at which members of his organization testified, permanent induction systems were installed in visitors' galleries at the Maryland House of Delegates, the State Senate, and in one hearing room. Other hearing rooms are equipped with portable systems. ■

NOTEWORTHY

The Third Circuit has initiated a newsletter, *Third Circuit Journal*. Its publication schedule is indefinite, but it is the hope of Circuit Executive Paul Nejelski that the journal will appear quarterly. The first issue, dated Summer 1982, was distributed in September; the second is in production. Number 1, in addition to news of appointments and circuit events, also includes articles on the Eastern District of Pennsylvania's arbitration experiment, on circuit uses of teleconferences, and an interview with the chairman of the circuit's Lawyers Advisory Committee.

The Second Circuit and Fourth Circuit also publish periodic newsletters; and the Ninth Circuit plans to revive its publication soon.

* * *

Following a jury's finding that John W. Hinckley, Jr., was not guilty by reason of insanity of charges of shooting President Reagan and three other men, U.S. District Court Judge Barrington D. Parker (D. D.C.), who presided over the Hinckley trial, received about 1,500 letters—most of which blamed him for the acquittal and criticized him for the instructions he gave the jury on the insanity plea. Some of the letters even included a "nasty streak of racism running through them," added Parker, who is black.

Judge Parker also said in an interview televised by the Independent Television News Association that the public did not seem to understand a trial judge's role as interpreter, not maker, of the law.

Nevertheless, Judge Parker does not support efforts to change the insanity plea. He told the interviewer that he disagrees with both the notions of abolishing the defense and of shifting the burden of proof to the defense, because it is one of our system's foundation stones that the government shall bear the burden of proof. ■

Devitt Award Established for Leading Jurist

Nominations for the first annual Edward J. Devitt Award for Distinguished Service to Justice are now being accepted. All Article III judges are eligible for the award, which carries an honorarium of $10,000. Any individual may submit a nomination for the 1982 competition, to honor a federal judge who has made "special contributions to the advancement of the cause of justice." The award has been established in recognition of Senior Judge Devitt, who was long the chief judge of the District of Minnesota, and whose thirty-six-year judicial career has included many substantial contributions to the cause of justice.

Judge Devitt will serve alongside Justice Byron H. White and Judge Gerald Bard Tjoflat on the panel that selects the winner of the first award.

Nominations should be in writing, states the West Publishing Company, sponsor of the competition, and could cite "a federal judge's scholarly writings, leadership in improving court administration, effectiveness in improving discovery practices, or accomplishment of any professionally related activity contributing to the advancement of the cause of justice."

The deadline for nominations is January 1, 1983. They should be submitted to: Devitt Distinguished Service to Justice Award, P. O. Box 43810, St. Paul, MN 55164. ■

Only Five Percent in Third Branch Are Article III Judges

The third branch of the federal government employed 15,328 individuals as of June 30, 1982, an increase of 722 or 4.7 percent over the total employed one year earlier. Of the total employed, only 5.6 percent, or 860, are Article III judges, while 7,132 persons, or 46.5 percent of federal judicial personnel, are members of judges' staffs, judges' clerks and employees in clerks' offices, or other federal court personnel. These personnel include circuit executives, court reporters, secretaries, law clerks, and others.

In addition, bankruptcy judges (236) and staff (2,568) numbered 2,804, or 18.3 percent of the total; U.S. magistrates (451) and staff (438) numbered 889, or 5.8 percent; and probation officers (1,610), probation office assistants (15), pretrial services officers (82), and clerks (1,022) totaled 2,729, or 17.8 percent of the judicial branch. Among the smallest categories were federal public defenders and their assistants (154) and staffs (147), who totaled 301 or 2 percent, and staff members of the Administrative Office (513) and of the Federal Judicial Center (100), who together totaled 4 percent of the overall number employed in the third branch.

(From the *1982 Annual Report of the Director* of the Administrative Office of the U.S. Courts, addendum to Table 21.) ■

Most Adults in Corrections Programs Are Not Incarcerated

Only about one-quarter of adults in federal and state correctional programs in 1981, or 26 percent, were in jails or prisons; the other three-quarters were in either parole (11 percent) or probation (63 percent) programs, reports the Bureau of Justice Statistics.

Translated into numbers, these percentages mean that at year's end 1981, 352,500 individuals were inmates of federal and state prisons with sentences of over one year, and 156,800 were in jails; 223,800 people were on parole; and 1,222,000 were on probation. Parolees under county jurisdiction, juveniles, or individuals in mental health institutions in lieu of prisons were not included in these totals.

Although the number on parole rose by less than 2 percent nationally, the overall probation figure grew 9 percent, with all states but two—Nebraska and South Carolina—reporting increases in 1981. ■

SO THEY SAY...

"In the recent history of this country, federal courts have stood as a bulwark for the protection of our basic constitutional guarantees. They have been willing to protect sometimes very unpopular constitutional guarantees when members of the legislative and executive branches have not had the courage to do so. We should support that role rather than detract from it if we are serious about keeping our oath to uphold the Constitution....The onslaught against constitutional guarantees, next to nuclear war, is the most serious threat to this nation."

—Senator Dale Bumpers, speech to the Eighth Circuit Judicial Conference, July 28, 1982.

"As a correctional administrator, I contend that education in corrections, generally, is not doing the job....We always hear the rhetoric that the administration is not supportive; the warden does not care; and, that there is no money. While we are currently in an economy of cutback management, if we continue to say 'Ain't it awful,' we will reinforce the complacency that already exists. This is a cop-out for lack of creative management and forward-looking program development."

--Gerald M. Farkas, associate commissioner, Federal Prison Industries, Inc., remarks before the State Directors of Correctional Education, July 25, 1982.

"Judging is no longer a cottage industry; it has become organized production marked by the division of labor, production quotas, and elaborate statistical controls. Staff attorneys, elbow clerks, secretaries (personal, pool, and otherwise), court executives and their staffs, and large numbers of non-legal clerks make up the milieu within which many judges function. A judge must to some degree become an administrator—a manager of the judicial process. Others will write much of what he signs; his talents as a "quick study" are honed, and "deliberation" consists of elbow clerks ascertaining whether the judge's provisional judgment can coexist with existing precedents. Perhaps I exaggerate but, if so, I think very little."

—Judge Joseph T. Sneed (Ninth Circuit), speech to the National Judicial College, August 6, 1982.

RECORDING, from page 1

held hearings on federal court reporting in June 1981, and later introduced what was to become the legislative revision described above. In December, Senator Howell Heflin introduced the provisions calling for the experiment and postponing the effective date of the amendment.

Until the statutory amendment takes effect, the current law remains in force. Only "shorthand or . . . mechanical means" may be used as the official court reporting method. Thus, despite the presence of the electronic sound recording equipment in the test courtrooms, the courts of appeals will receive only steno-based transcripts during the course of the experiment.

For the experiment, electronic sound recording equipment has been placed in twelve district courtrooms in ten circuits. The test will allow what Senator Heflin called "a comparison between the existing system and various electronic systems, side by side." Whenever transcripts are requested of the official court reporter, the electronic sound recordings will be sent to a transcription company for the production of a corresponding transcript. Sample transcripts will be compared through a multistaged review process to assess the accuracy of the tape-based transcripts, mainly using the official transcripts as the standard. The experiment will also analyze the timeliness of transcript production, the costs of the two systems, and the ability of electronic sound recording to meet all other demands that federal district courts impose on the current court-reporting system.

The Center expects to have the side-by-side comparison in place for approximately six months, after which it will prepare a report of its findings for the use of the appropriate Judicial Conference committees, and for distribution to all other interested parties.

Numerous groups have indicated deep interest in this project, and the Center has stressed on several occasions its interest in receiving comments and criticism from all interested parties. Because of their interest in this project, the United States Court Reporters Association and the National Shorthand Reporters Association have created a Task Force on Testing Guidelines for Alternative Court Reporting Systems.

Prime responsibility for the project is assigned to the Center's Division of Innovations and Systems Development. Because of the widespread interest in this project, the directors of the Center and the Administrative Office have asked that those requesting information about the experiment or wishing to voice comments or criticism direct all such communications to Russell R. Wheeler, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005.

The GAO study referred to above also criticized the district courts' management of court reporters. The Judicial Conference, at its March 1982 meeting, recommended that the judicial councils direct every district court to "develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the court." The management plans, however, are unrelated to the electronic sound recording experiment. ■

Decision Reporters Form Association

The National Association of Reporters of Judicial Decisions held its inaugural meeting July 26 and 27 in the Maryland Court of Appeals, Annapolis, Maryland, to adopt bylaws and to elect officers. The association will aim "to improve the accuracy and efficiency of reporting [appellate] decisions of the federal and state courts" and to become a medium for communication and cooperation among official reporters.

Chosen to be first president is Henry C. Lind, U.S. Supreme Court; as vice-president, James H. Norris, Jr., Maryland Court of Appeals; as secretary, George Earl Smith, Alabama Supreme Court; and as treasurer, John T. Fee, U.S. Tax Court.

Membership is open to any employee in a reporter's office of an appellate court—federal or state, the U.S. Supreme Court, the U.S. Court of Military Appeals, and the U.S. Tax Court. Further information may be obtained from Mr. Lind, at (FTS) or (202) 252-3191. ■

Eighth Circuit Publishes Two Years of Statistics

A progress report covering the work of the Eighth Circuit for the years 1980 and 1981 has been released and made available to the bar and the general public by Chief Judge Donald P. Lay. Circuit Executive Lester C. Goodchild, the author of the circuit's first progress report, has announced plans to publish an annual publication.

The report notes that: total case filings in the Eighth Circuit Court of Appeals for 1981 were almost 50 percent above the filings five years ago. In this same period civil case filings were 70 percent higher, administrative case filings rose almost 30 percent, and criminal case filings declined slightly.

The Eighth Circuit recorded the second most substantial growth in pending cases in the nation in 1980 when its pending caseload rose almost 25 percent over 1979.

District courts' criminal case filings declined from 1977 to 1981 by almost 10 percent, while total pending cases declined more than 13 percent. During 1981 the national statistics showed a 9.2 percent increase in pending criminal cases, while the criminal dockets in the district courts of the Eighth Circuit decreased by 9.6 percent. During the 1977-1981 period civil case filings rose over 53 percent, civil case terminations increased by 50.4 percent, and pending cases increased by 30.7 percent.

The circuit's EEO report shows advancements in the employment of women and minorities; however, the circuit's totals are below the national average. In the category of legal/professional personnel in the circuit, 63.5 percent are males and 36.5 percent females; minorities and handicapped total 4.9 percent. ■

PERSONNEL

Appointments

David D. Dowd, Jr., U.S. District Judge, N.D. Ohio, Oct. 8
Bruce M. Selya, U.S. District Judge, D. R.I., Oct. 12
Raymond L. Acosta, U.S. District Judge, D. P.R., Oct. 14
Edward Rafeedie, U.S. District Judge, C.D. Cal., Oct. 29
George C. Fagg, U.S. Circuit Judge, 8th Cir., Nov. 1
James C. Fox. U.S. District Judge, E.D. N.C., Nov. 10

Senior Status

C.G. Neese, U.S. District Judge, E.D. Tenn., Aug. 31
Stanley Weigel, U.S. District Judge, N.D. Cal., Oct. 9
Roger D. Foley, U.S. District Judge, D. Nev., Oct. 29
John D. Butzner, Jr., U.S. Circuit Judge, 4th Cir., Nov. 1

Deaths

Frank W. Wilson, Chief Judge, E.D. Tenn., Sept. 29
Richard T. Rives, U.S. Circuit Judge, 11th Cir., Oct. 28

PROGRAMS, from page 1

remedies for private wrongs, including constitutional torts, civil rights actions (primarily under 42 U.S.C. § 1983), implied private rights of action, and actions under Title VII of the 1964 Civil Rights Act and other employment discrimination statutes.

As specific information on the curriculum and faculty at each program becomes available, the Center will provide it to judges who express interest in attending one of the programs.

Application Procedures: Judges wishing to request Center support to attend any one of the four summer programs should so indicate by letter, as soon as is convenient, to Kenneth C. Crawford, director of the Center's Division of Continuing Education and Training. Letters must be received no later than January 28, 1983.

Judges' requests for support will be accommodated to the extent that funds budgeted for the summer programs will allow, and subject to the presumption that judges who received Center support to attend the Harvard or Columbia programs in past years will normally not be eligible for support for any of the four programs this summer. Moreover, judges who will have been on the bench for only a short period at the time of the program will normally not be eligible. If requests for support exceed the support available, selection will be made by a committee appointed by the chairman of the Center's Board.

Center support will not exceed the amounts for travel and subsistence available to judges under existing government regulations. Special economical dormitory facilities will be available at each law school, and details on these arrangements will also be made available to interested judges as this information is received. ■

Carl Imlay, General Counsel to the U.S. Courts, Retires

Carl Hudson Imlay, general counsel at the Administrative Office of the U.S. Courts, retired on October 22, 1982. Mr. Imlay achieved national recognition as the federal judiciary's advisor in matters of law pertaining to court operations. He has served the Supreme Court, the Judicial Conference, and virtually every office within the U.S. courts.

As general counsel, Mr. Imlay was the legal advisor to the director and operating officers of the Administrative Office and has acted as either secretary or advisor to several Judicial Conference committees, including the Committees on the Administration of the Criminal Law and the Operation of the Jury System. He has published articles in several areas of law, including jury selection, probation, and sentencing, and has lectured extensively on the subject of correctional law.

Mr. Imlay assumed his current position in 1966 after six years in private practice with several Washington firms, concentrating in communications law. He had previously served briefly with the Administrative Office in the late 1950s and before that had spent eight years with the Criminal Division of the Department of Justice, where he specialized in appellate litigation. During his Justice Department service he was engaged principally in representing the government before the Supreme Court, as well as before the U.S. courts of appeals. He personally argued four cases in the Supreme Court and was involved in the briefing of numerous other cases on behalf of the government.

A native of Washington, Mr. Imlay is a graduate of Harvard College. During World War II he served as an Army officer in the Quartermaster Corps in England, France, Belgium, and Germany. Following the war he studied law at George Washington University, from which he was graduated with honors in 1948. He was a member of the Order of the Coif and the *George Washington Law Review*. In 1949 he married Dorothy Willenbucher, a law school classmate. They have two sons, Christopher David and Charles Lincoln. Following law school he was associated in the practice of law with his father, Charles V. Imlay, before joining the Justice Department.

Mr. Imlay and his family recently sold their home in Olney, Maryland, and now reside at their longtime weekend retreat, the Devil's Backbone, a farm near Antietam Battlefield in Boonsboro, Maryland. ■

Sixth & Ninth Circuits Release Annual Reports

The Sixth Circuit Annual Report for the twelve-month period ending June 30, 1982, shows a significant increase in case dispositions in the court of appeals. Dispositions were up 16.5 percent and, for the first time since 1970, dispositions exceeded filings even though filings increased. Pending cases, therefore, dropped by 135 cases from 1981. The report noted that this increase in productivity occurred even though the court operated at full strength for only three months of the year.

The report noted that, for the first time, regularly scheduled hearings exceeded 1,000. This reflects the relatively high ratio of hearings to new case filings of 41.2 percent.

In January 1982 the Sixth Circuit began an experimental calendar by splitting its complement of active judges in half, with each half sitting for seven two-week sessions. The entire court, therefore, will have been in session twenty-eight weeks in 1982. The new schedule permits the court to accommodate visiting judges more readily. The new schedule also provides for each panel to consider a number of summary disposition cases during conferences on cases assigned to the panel for hearing. Thus special trips to consider these summary disposition cases are not necessary.

See CIRCUITS, page 8

CALENDAR

Nov. 15 Judicial Conference Advisory Committee on Appellate Rules
Nov. 15-16 Judicial Conference Subcommittee on Judicial Statistics
Nov. 15-17 Workshop for Clerks of Circuit and National Courts
Nov. 17-19 Seminar for Bankruptcy Judges
Nov. 29-Dec. 1 Seminar for Magistrates
Dec. 6-8 Workshop for Clerks of U.S. District Courts
Dec. 8-10 Workshop for Chief Deputy Clerks of District Courts and Circuit Courts of Appeal and Select Divisional Office Deputy Clerks in Charge
Dec. 9-10 Judicial Conference Subcommittee on Federal-State Relations
Dec. 13-14 Judicial Conference Subcommittee on Supporting Personnel
Dec. 13-15 Seminar for Newly Appointed Federal Appellate Judges
Dec. 16-17 Judicial Conference Subcommittee on Judicial Improvements
Jan. 10-14 Judicial Conference Committee on Pacific Territories
Jan. 12-14 Seminar for Bankruptcy Judges
Jan. 13-14 Judicial Conference Committee to Implement the Criminal Justice Act
Jan. 13-14 Judicial Conference Committee on Rules of Practice and Procedure
Jan. 14 Judicial Conference Committee on Administration of the Bankruptcy System
Jan. 18-21 Judicial Conference Committee on Judicial Ethics
Jan. 19-21 Workshop for Judges of the Ninth Circuit
Jan. 20-21 Judicial Conference Committee on Administration of the Magistrate System
Jan. 20-21 Judicial Conference Committee on the Operation of the Jury System

Death-Row Prisoners' Total Swells in 1981; Nearly One-Half in Florida, Texas, and Georgia

The number of persons on death row reached a record-breaking 838 on December 31, 1981, and represented an increase of 150 over the number of condemned prisoners at year's end 1980. Three times as many individuals were sentenced to death during that year as were removed from the list, according to a recently released Bureau of Justice Statistics bulletin, "Death-row Prisoners 1981." One was executed, one was a suicide, two died of natural causes, and seventy-four were relieved of the death penalty. The 228 new death-row prisoners represented a 16 percent increase over the number who received death sentences in 1980.

Death-row prisoners tallied in these statistics included 11 women (all from southern states) and 47 Hispanics (including 16 in Texas and 12 in California). Blacks represented 41 percent of the condemned prisoners.

At the close of 1981, thirty-six states had statutes permitting capital punishment, and twenty-eight of these had prisoners awaiting execution. Three states had nearly half of all death-row prisoners: Florida had the largest number, 161, with death sentences; Texas had 144; and Georgia had 91. During 1981, however, California, whose total of condemned swelled from 44 to 83, contributed most to the national increase in condemned prisoners.

Nationwide, said Benjamin H. Renshaw III, acting director of the bureau, the number of death-row prisoners has been rising steadily over the last five years. Four have been executed since 1976, but only one of these did not wish to die. Eight persons on death row during this period, however, have committed suicide, according to the New York State Defenders Association.

"The United States will witness a spate of executions beginning in 1983-84 without parallel in this Nation since the depression era," wrote Renshaw in the BJS bulletin. Since increasing numbers of states have enacted capital punishment measures that have passed constitutional muster, and many inmates are exhausting their available appeals, "the situation is ripe for the Nation to witness executions at a rate approaching the more than three per week that prevailed during the 1930's." ■

CIRCUITS, from page 7

The Ninth Circuit has likewise experienced an increase in dispositions. Terminations in 1982 were up 5 percent. Since filings were up 2 percent, the pending caseload was down 3 percent.

These statistics were noted in the first Annual Report of the Ninth Circuit Executive. The report announced, as well as workload statistics, several recent innovations. The Annual Action Plan adopted by the Ninth Circuit Judicial Council set priorities and goals for the coming year. The plan covers, among other subjects, court reporter management, space needs, and juror utilization.

The Annual Report also reviewed the Ninth Circuit Innovations Project, which was designed to implement a series of measures to reduce backlog and deal with related problems of size and productivity. The project includes a screening program; fixed, five-day, nine-months-a-year hearing panels; a reduction in the use of visiting judges; prebriefing conferences; improved decisional practices; and improved administrative practices. As part of this project the court of appeals agreed to a 50 percent increase in workload per active judge, effective January 1982. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Victim and Witness Protection Act of 1982 Will Have Major Impact on the Courts

In the waning hours of October 2, just before departing Washington for its preelection recess, Congress passed the Victim and Witness Protection Act of 1982 (S. 2420). The act became law (P.L. 97-291) when President Reagan signed it during a Rose Garden ceremony October 12.

The new law is expected to have wide repercussions on the judiciary, particularly on judges, magistrates, probation officers, and pretrial services officers. Among other things, it requires victim impact statements of a specified nature in all presentence reports on federal offenders; widens federal law on witness intimidation, tampering, and retaliation and toughens penalties for these crimes; provides for both temporary and permanent restraining orders to protect victims and witnesses from harassment; and mandates federal courts to require offenders to make restitution to their victims or designees, in addition to or in lieu of other penalties, and, when no restitution or partial restitution is ordered, requires judges to provide reasons in writing.

Most requirements of the act are effective immediately, but one exception and one ambiguity are noteworthy. The provisions relating to restitution will apply to offenses occurring on or after January 1, 1983. In addition, Congress's intention to delay the effective date for victim impact statements (section 3) until March 1, 1983, was inadvertently rendered ineffectual by a typographical error in section 9, making section 3 effective upon enactment. The act applies only to federal offenders and federal crimes and probation and parole violations; but one of Congress's hopes for the act is that it serve as model legislation for state and local governments.

Among the act's provisions are the following:

- Section 3, regarding Victim Impact Statements, amends F.R. Crim. P. 32(c)(2) to require that the presentence report contain, in addition to the previous inclusion of the defendant's criminal record and information about the defendant that may be helpful in sentencing, "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense" and, also, any information concerning "the restitution needs of any victim of the offense." Prior to the act's passage, such types of information could be included in presentence reports; now the court must specifically direct the collection of such information, which must be included in every presentence report.

(The Probation Division monograph, *The Presentence Investigation Report*, also known as Publication 105, is currently undergoing revision and will include a section on the Victim Impact Statement. Copies of the section have already been distributed to appropriate personnel in the judiciary.)

- Section 4 of the act amends 18 U.S.C. Chapter 73, on "Obstruction of Justice," by adding four new sections. Two of the sections (§ 1512 and § 1513) clarify and broaden criminal offenses relating to intimidation of victims and witnesses already codified in 18 U.S.C. § 1503 (pertaining to witnesses in federal courts), § 1505 (regarding witnesses before congressional or federal department or agency proceedings), and § 1510 (dealing with informants). Sections 1503 and 1505 are parallel provisions prohibiting the use of force or threats to intimidate witnesses. This section also reaches

See VICTIM ACT, page 7

Chief Justice Urges Judicial Systems Planning

Citing dramatic increases in the number of cases filed at all levels of our state and federal courts and noting significant change in the novelty and complexity of the issues presented, Chief Justice Warren E. Burger recently called for a comprehensive study of the problems facing our courts and the development of long-range plans for the future of our judicial systems.

The Chief Justice, addressing the Arthur T. Vanderbilt dinner sponsored by New York University and the Institute of Judicial Administration, stated, "We have reached the point where our systems of justice—both state and federal—may literally break down before the end of this century, notwithstanding the great increase in the number of judges and the large infusion of court administrators."

The proposed study, the Chief Justice said, could build upon the important work of the Williamsburg and Pound Conferences and the Freund

See STUDY, page 5

1983 Summer Programs

Reminder: District and appellate judges wishing Center support to attend one of four law school summer programs in 1983—at Harvard, Columbia, Northwestern, or Brigham Young University—should write to Kenneth C. Crawford, Director of the Center's Division of Continuing Education and Training, Washington, D.C. 20005. Letters must be received by January 28, 1983. Further details on the summer 1983 programs are available in the November *Third Branch* (p.1).

Ju 10. 3/2:

"E.L.F." Movement to Have Mammoth Impact on Economy

It is an old saw that "time is money." To that homily, the cost-conscious have paired a more recent observation, which could be stated in parallel fashion as "space, too, is money." With costs of equipment and supplies on an ever-upward spiral, and costs of office space to the judicial branch increasing at skyrocketing pace, the Judicial Conference of the U.S. decided at its September 1981 sessions to eliminate the use of legal-size documents in all federal courts, effective January 1, 1983. That letter-size paper is approximately 25 percent smaller than its legal-size counterpart and thus will cost the U.S. Treasury 25 percent less is readily apparent. What judicial officers and employees may be unaware of is the fact that the movement to abolish legal-size paper is government-wide, at all levels of government, and, further, it is also taking hold in the vast private sector of business and industry. Over half the states now have statutes directing employees to phase out legal-size documents and to convert to letter-size. The ramifications of the switchover to uniform-size documents are many, according to the Association of Records Managers and Administrators (ARMA), the 1,500-member professional group that started the ELF movement and lobbied for its passage in legislatures and boardrooms all around the country. ELF is the acronym for Eliminate Legal-size Files, and its aim is to reduce unnecessary costs and inefficiencies that are the direct result of legal-size paper.

Legal-size files include as little as 5 percent legal-size documents, but the 10,000 cubic inches of wasted space in legal-size cabinets occupy 16 percent more floor space than letter-size cabinets and the larger furniture costs the purchaser (in the case of the judicial branch as well as throughout government, the taxpayer) from 13 percent to 28 percent more than its more reasonably sized counterpart.

Moreover, government agencies and businesses using both sizes of paper must keep double inventories, stocking two types of letterhead stationery, second sheets, carbons, copy sets, Xerox paper, file folders, file guides, stencils, binders, writing pads, mailers, and envelopes, and, still more, maintain these double inventories at every work station and inventory area. It follows that such double inventories are also necessary at every step from producer to wholesaler, to stationer to office equipment dealer to warehouse.

This is not to overlook the extra cost to the end-user, and in the instant case to the public, of 960 square inches of furniture-grade, casework steel wasted with each average lateral file cabinet, nor to overlook the cost of additional tooling necessary to enable dual use of copying machines and microfilm reader/printers or of laboratory technicians who must worry about reduction ratios and combinations of modes when filming oversize documents.

Naturally, legal-size documents are heavier and more costly to mail, take up more space in trucks, and are heavier to lift. Lest one think the proponents of ELF have overlooked anything, it is important to point out that all these excesses in paper, cardboard, steel, and plastic waste natural resources. Larger objects cost more to make as well as to transport. It takes about two trees from the Northwest or seventeen southern trees to produce a ton of paper, and energy. Paper is 100 percent recyclable, ARMA says, but much of it is lost as unrecovered waste, and one of ELF's goals is "eliminating potential waste before it occurs."

What all this means for judicial branch employees, besides a lesson in logic and effective lobbying techniques, is contained in a directive issued by the General Services Administration during the summer. GSA Bulletin FPMR B-120 instructs all federal agencies to use up existing stocks of legal-size paper materials, to institute no new legal-size files, and to plan for conversion of existing information storage and retrieval systems to the new letter-size standard. No agency is expected to replace large file cabinets immediately with smaller ones, but neither are purchases of legal-size furniture to be made. Where additional legal-size equipment is needed, it should be obtained from excess inventories kept by GSA's Federal Property Resources Service. Still more, directs the GSA bulletin, no further legal-size forms should be designed. Revision of old forms to letter-size should take place "at the earliest practicable time." ■

THE THIRD BRANCH
BULLETIN OF THE FEDERAL COURTS

Published monthly by the Administrative Office of the U.S. Courts and the Federal Judicial Center. Inquiries or changes of address should be directed to 1520 H Street, N.W., Washington, D.C. 20005.

Co-editors
Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.
Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

Workload Statistics for 1982

The Administrative Office of the U.S. Courts has now published its annual compilation of key statistics on the workload of federal judges, *Management Statistics for United States Courts—1982*. The new volume, like preceding editions, contains data per judgeship for each U.S. district court and per panel for each U.S. court of appeals, and, in addition, national profiles. The publication will be distributed automatically to all U.S. district and circuit judges, circuit executives, clerks of court, deputies in charge of divisional offices, and court libraries. ■

Holiday Message from Chief Justice Warren E. Burger

The Christmas Season brings us to the close of the third year of the 1980s and it is a good time to look back, to reflect, and to consider the "unfinished business" ahead.

We have made progress, both on general goals and meeting specific problems. For example, the administration—with the vice-president and the attorney general spearheading the efforts of a special task force—gave the federal courts added responsibilities in the Southern District of Florida in a concentrated effort to curb the mushrooming drug and drug-related problems. In response to my call, forty visiting judges agreed to assist in the program and through their dedication we expect that an abnormal caseload will be handled on a reasonable schedule.

Fifty new judges have been added to the federal court system this year, thirty-seven to the district courts and thirteen to the courts of appeals. These judges are working hard to give the litigants access to the judicial process with a maximum of speed and efficiency. Much credit is due those at the Federal Judicial Center and the Administrative Office of the U.S. Courts, who, with great assistance from the judiciary, have helped facilitate the transition of these new colleagues into the federal court system.

An important new twelve-member court came into being October 1, 1982—the Court of Appeals for the Federal Circuit. It suggests a lessening of our traditional opposition to specialized courts.

Following up on the work of the committee, appointed in 1971 and chaired by Paul Freund, on the caseload of the Supreme Court and the report of the later committee chaired by Senator Hruska, I spoke out again last month on the problem of growing caseloads. I again raised fundamental questions that must be resolved. Happily, in the past year, we have observed a growing awareness by members of the bar and the judiciary of just how acute this problem is. The Supreme Court is at a crisis point, as both the Freund Committee and the Hruska Report stated years ago. With vastly increased burdens the Supreme Court is facing new demands with essentially the same structure as a century ago. And of course the Court's caseload simply reflects the burden shared by all courts in the nation. Without changes—fundamental changes—there is every indication that in many areas our systems of justice will literally break down before the end of this century. That members of the bar, the judiciary, eminent scholars, and practitioners are talking about it is encouraging. The Freund and Hruska Reports are coming into their own.

But there must be more: there must be changes, based on these 1972 and 1975 studies. A century-old structure adequate for the post-Civil War period cannot cope with the burdens of the 1980s and 1990s, to say nothing of the 21st century. The Congress, overwhelmed with many problems and demands, has given thoughtful consideration to our problems, but the progress is glacial. We have good working relations with the executive branch on matters of administration.

Our country should be grateful—as I am—for the support all of you and your staffs have demonstrated through your dedicated service. We continue on many "fronts" to press for improved compensation and benefits paralleling those provided for all other career personnel and we hope for progress in the new year.

Mrs. Burger joins me, as do my colleagues on the Court, in wishing each of you and your households a happy holiday season.

Sincerely,

Warren E Burger

CALENDAR

Jan. 10-14 Judicial Conference Committee on Pacific Territories
Jan. 12-14 Seminar for Bankruptcy Judges
Jan. 13-14 Judicial Conference Committee to Implement the Criminal Justice Act
Jan. 14 Judicial Conference Committee on Administration of the Bankruptcy System
Jan. 18-21 Judicial Conference Committee on Judicial Ethics
Jan. 19-21 Workshop for Judges of the Ninth Circuit
Jan. 20-21 Judicial Conference Committee on Administration of the Magistrate System
Jan. 20-21 Judicial Conference Committee on the Operation of the Jury System
Jan. 20-21 Judicial Conference Advisory Committee on Codes of Conduct
Jan. 24-25 Judicial Conference Committee on Court Administration
Jan. 24-25 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice
Jan. 24-25 Judicial Conference Committee on Administration of the Criminal Law
Jan. 26-28 Workshop for Judges of the Eighth and Tenth Circuits
Jan. 27-28 Judicial Conference Committee on the Judicial Branch
Jan. 31-Feb. 1 Judicial Conference Committee on the Budget
Jan. 31-Feb. 1 Judicial Conference Committee on Administration of the Probation System

A New Face

Readers of *The Third Branch* have by now noticed a new look to the past two issues. We have been trying out a new format, but implementing it has brought delays and some problems. This issue for December is closer to what we had planned for the October issue. We hope you like it.

We invite your comments.

NOTEWORTHY

"Open season" for federal employees to change group health insurance plans was scheduled to run from November 22 to December 10, but the closing date has been extended to December 23, 1982.

Federal workers may need the extra time to make their way through the maze of non-parallel features of the numerous available plans, which for every employee and retiree means choosing among at least fifteen plans. Plan brochures, comparison charts, and rate booklets printed by the Office of Personnel Management may not be much assistance in guiding each employee to the plan best for that individual or family. Those who would prefer a one-stop guide to all the plans may want to scan a paperbound booklet prepared by a private Washington consumer-advocacy group, titled *Checkbook's Guide to 1983 Health Insurance Plans*. Copies have been purchased by A.O.'s Personnel Division and distributed to division chiefs' offices for their staffs. Those who want their own copies (for $3.95) should telephone (202) 347-9612 or send a check made out to "CHECKBOOK," addressed to CHECKBOOK—Health Insurance, 1518 K Street, N.W., Suite 406, Washington, D.C. 20005.

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All government health plan premiums are scheduled to rise, beginning January 1, 1983. The average rate hike for employees and retirees will be 24 percent, or nearly a dollar a day. The government's portion will also rise. Benefits, on the other hand, will remain basically unchanged. The new price hikes come on the heels of 31 percent rate increases instituted this year, for 16 percent fewer benefits.

* * *

In January, a new, regular deduction will be taken from federal employees' paychecks, when U.S. and postal employees begin to pay a Medicare tax. The new 1.3 percent tax on salary will range from $108 to a ceiling of $464 a year (up to $35,700 of salary), and will be added to the 7 percent currently deducted for federal retirement benefits, for a total of 8.3 percent of salary. This will be the first time federal employees will have contributed to the Social Security system, and according to the *Federal Employees' News Digest* is regarded as the first step toward eventually bringing the federal force into the Social Security system, which is an end earnestly desired by the Reagan administration.

The new connection with Medicare will prove to be a bonanza for federal workers retiring in January 1983. Those who work a "short period of time" in January before retiring will earn the same eligibility for Medicare benefits at age 65 as individuals who have paid social security taxes as long as they have worked. The Department of Health and Human Services is now working on a regulation that will include a definition of a "short period of time." ■

STATE-FEDERAL

This year there has been a resurgence of interest in the state-federal judicial councils, and though there is a commonality to the subjects discussed at most of the meetings (habeas corpus cases, civil rights filings, and conflicting calls on counsel by both courts) some innovative techniques and procedures have emerged that should inure to the mutual benefit of the judiciary and the litigants. At least three states have reconstituted their councils, which had been defunct for some time.

During the past year meetings have been reported by the states of Alabama, Arizona, Alaska, California, Connecticut, Georgia, Montana, Nevada, New York, and Oregon.

Of significance this year is the appointment of a Subcommittee of the Judicial Conference of the United States on State-Federal Relations, which is meeting this month. Included on the subcommittee will be representatives of the Conference of Chief Justices. This group of state and federal judges, working closely toward common goals aimed at bettering both court systems—and their relationships to each other—give promise of improvements in many areas of the law. On their agenda for discussion is the subject of basic principles of federalism and how jurisdiction should be allocated between the state and federal courts.

Of interest are some of the innovative matters that have surfaced from a reading of council minutes. In Alaska, for example, the council is to be used as a planning group for that state's historical society and it will cooperate in collecting, preserving, and displaying memorabilia and historical papers related to the history of Alaska, dating back to pre-statehood days. In Alabama, Chief Judge Sam C. Pointer, Jr. (N.D. Ala.) reports that in

See COUNCILS, page 5

COUNCILS, from page 4

some cases where identical facts have resulted in filings in both state and federal courts, documents submitted responsive to pretrial discovery motions have been placed in a depository accessible to both judges, to the advantage of both courts and the litigants.

In another state (New York) there have been discussions on the use of a panel of independent experts, and in another (Oregon) an interesting report on how issues of state law are not only certified by a federal court to the state's highest court, but also, when multiple complex facts are at issue, involving multiple states, certification is sometimes requested from one state to another. But often the agendas are of a lighter nature and the judges find it helpful merely to keep up personal contacts by a luncheon or breakfast meeting. Said one judge, "It makes it easier to pick up the telephone and call the other judge if some problem does surface."

[Note: Copies of minutes of many of these meetings, as well as a list of suggested subjects, are available from the Federal Judicial Center by writing Alice O'Donnell, Division of Inter-Judicial Affairs.] ■

FILMS & TAPES

Protracted Criminal Cases. Videocassettes of Chief Judge William Terrell Hodges' 52-minute lecture, "A Checklist of Twenty Techniques to Be Applied in the Trial of Protracted Multi-Defendant Criminal Cases," are now available from the Center's Media Library. Chief Judge Hodges (M.D. Fla.) gives separate treatment to twenty procedures or steps that may be invoked as aids in managing all phases of the multiple-party, protracted criminal case. A packet of informational materials, including appendixes and forms developed by Judge Hodges for the lecture, accompanies the program.

To borrow the program, please write to the Center's Media Services Unit, 1520 H Street, Washington, D.C. 20005, requesting cassette VJ-852, "Management of Protracted Criminal Cases," and specifying either three-quarter-inch U-matic or one-half-inch VHS. If demands for the program are heavy, there may be some delay in distribution, caused by the mechanics of reproducing the tape in volume.

Antitrust Audiotapes. The Third Branch readers are reminded of the availability for loan of eleven audiotapes containing Professor Philip Areeda's lectures on antitrust law, tracing the evolution of various standards for antitrust analysis. The lectures were delivered during the first three days of the antitrust seminar sponsored by the Center for district and appellate judges in the summer of 1981 on the University of Michigan Law School campus.

Please request the tapes from the address above, specifying AJ-0450, "Antitrust Matters." (Professor Areeda's 44-page monograph, prepared for the seminar, is also available from the Center. "The 'Rule of Reason' in Antitrust Analysis: General Issues" may be requested from the Center's Information Service Office. To expedite shipment of the monograph, please include a self-addressed, gummed label, which need not be franked, with the request. Both the tapes and the monograph were previously announced in the October 1981 *Third Branch.* ■

STUDY, from page 1

and Hruska Reports. Included would be assessments of alternative methods of dispute resolution as well as plans for the actual structure and administration of the federal court system. Further, the study would explore the manner in which courts handle cases and the methods for resolving conflicts among the circuits.

The Chief Justice reviewed the Supreme Court's growing caseload—"almost trebled in my time as a federal judge"—asserting that "[t]he danger does not lie in attacks on the court; attacks on the court have been going on for at least 180 years. The real risk is that the institution will be submerged gradually, by placing on it burdens that cannot adequately be carried." For example, he said, various types of specialized appellate courts have enjoyed use in England, on the Continent, and in several American state jurisdictions. Although "not in any sense suggesting that we slavishly copy these models," the Chief Justice urged that "we must reexamine the mind-set that brought us where we are today."

Other problem areas merit scrutiny, said the Chief Justice. In state courts, the role of judges in the initial stages of child custody cases, domestic disputes, and the administration of the estates of decedents and minors should be studied. On the federal side, regulation of the use of pretrial procedures, particularly discovery, needs to be explored. "In some circumstances," the Chief Justice said, "trial judges have a duty to impose disciplinary monetary sanctions, not on the litigant, but on the advocates guilty of the abuse." He called again for the elimination of diversity jurisdiction, and for reasonable limits on the jury selection process, and said that methods to handle the administration of bankrupt estates more efficiently must be developed.

Chief Justice Burger pointed out that one basis for such a study already is in existence. On October 1, 1982, the Senate passed S. 675. That legislation would establish a three-branch, bipartisan commission to study federal and state court systems and to recommend improvements for both. Enactment, according to the Chief Justice, "would be a step in the right direction." ■

New Administrators at A.O. and FJC

William M. Nichols has been selected as general counsel of the Administrative Office of the United States Courts. Mr. Nichols, who holds a B.S. from the U.S. Military Academy and an L.L.B. from Harvard Law School, comes to the federal judiciary after several years of service as general counsel at the Office of Management and Budget. Prior to that position, he worked in both the Criminal Division and Legislative and Legal Section, Office of the Deputy Attorney General at the Department of Justice.

William M. Nichols

In other personnel matters, the Administrative Office has announced the appointment of Peter G. McCabe to the position of assistant director for program management, with responsibility for the Bankruptcy, Clerks, Criminal Justice Act, Magistrates, and Probation Divisions. Mr. McCabe, a graduate of Columbia University and Harvard Law School, has been with the A.O. since 1969, serving as chief of the Magistrates Division since 1973.

Also, the Federal Judicial Center has made two significant staff announcements. Dr. Russell R. Wheeler, formerly assistant director of the Center, has been named deputy director for the Continuing Education and Training Division. Dr. Wheeler, a former Judicial Fellow, holds degrees from Augustana College and the University of Chicago. Alan J. Chaset, the assistant director of the Research Division since 1974, has been selected as deputy director of the Division of Inter-Judicial Affairs and Information Services. Mr. Chaset is a graduate of Clark University and the Georgetown University Law Center. ■

Position Available

Clerk of U.S. Court of Appeals for the First Circuit, District of Massachusetts. Salary up to $57,500 (up to JSP-16), depending on education and experience. Requires law degree and bar membership, and a minimum of ten years of progressively responsible administrative experience in public service. Position available March 3, 1983. Closing date for applications is January 3, 1983. Send applications to: Mr. Dana Gallup, U.S. Court of Appeals, 1606 John W. McCormack Post Office and Courthouse, Boston, MA 02109.

EQUAL OPPORTUNITY EMPLOYER

Position Available

Assistant Circuit Executive, First Circuit, Boston, Mass. Salary from $21,449 to $33,586 depending on qualifications. Requires B.A. Graduate study in law, public administration, or judicial administration is desirable, or a minimum of six years of progressively responsible work experience, including three in a management position in a federal or state court. Position available March 1, 1983. Closing date for applications is January 3, 1983. Send applications to: Mr. Dana Gallup, U.S. Court of Appeals, 1606 John W. McCormack Post Office and Courthouse, Boston, MA 02109.

EQUAL OPPORTUNITY EMPLOYER

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to author, title or other description, and ISIS Database Number (in parentheses following the item). Requests should be in writing, preferably accompanied by a self-addressed, gummed mailing label (franked or unfranked), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, D.C. 20005.*

ABA, Criminal Justice Section. Task Force on Crime Report to the ABA House of Delegates, 1982.

Bell, Griffin B. *Antitrust Contribution and Claim Reduction: An Objective Assessment.* National Legal Center for the Public Interest, 1982.

✓Brennan, William J., Jr. Address at Park School, Baltimore, "Brain Thrust," November 21, 1982. (#3029)

✓Burger, Warren E. Remarks at the Arthur T. Vanderbilt Dinner, sponsored by New York University and Institute of Judicial Administration, November 17, 1982. (#3030)

Fitzpatrick, Collins T. "Depleting the Currency of the Federal Judiciary." 68 *A.B.A.J.* 1236 (October 1982).

Re, Edward D. "The Lawyer as Counselor and the Prevention of Litigation." 31 *Catholic University L.R.* 4 (Summer 1982).

✓Stevens, John Paul. "The Life Span of a Judge-Made Rule." James Madison 1982 Lecture, New York University School of Law, October 27, 1982. (#3033)

Swygert, Luther M. "In Defense of Judicial Activism." 16 *Valparaiso L.R.* 3 (Spring 1982).

✓Wallace, J. Clifford. "Working Paper—Future of the Judiciary," 94 F.R.D. 225. (#3034)

Memorial Volume to Bernard J. Ward. Articles in memoriam by Lewis F. Powell, Jr., Clement F. Haynsworth, Jr., Frederick J. R. Heebe, Charles Alan Wright; and "The Federal Judges: Indispensable Teachers," by Bernard F. Ward. 61 *Texas L.R.* (August 1982).

VICTIM ACT, from page 1

third-party intimidation (as, for instance, in prohibiting the use of force, threats, or misleading conduct against a family member for the purpose of intimidating a witness.) The section also broadens existing law to protect persons reporting information about a violation or a possible violation of a federal order of probation, parole, or pretrial release.

Section 1512 also provides for a maximum sentence of ten years for offenses defined in the section, and raises the previous maximum in § 1503 of five years. Likewise, the section lifts the maximum fine potential from $5,000 to $250,000.

- New section 1513 clarifies and expands federal retaliatory offenses against witnesses and informants by reaching threats of retaliation and third-party retaliation, and also raises maximum prison terms to ten years and fines to $250,000.
- New § 1514(a) establishes a new cause of action in federal law. This section authorizes a federal district court to issue (*ex parte*, if necessary) a temporary restraining order to prevent harassment of or retaliation against a victim or witness. New § 1514(b) authorizes a court, upon motion of a government attorney and after a hearing, to issue a protective order prohibiting harassment of a victim or witness for up to three years, if necessary. Subsections detail procedures for the court to follow in issuing such orders.
- Section 5 adds new §§ 3579 and 3580 on restitution to the U.S. Code, and authorizes a court to order restitution in lieu of or in addition to any other penalty imposed for Title 18 offenses and certain aircraft hijacking offenses under the Federal Aviation Act. Existing law permitted a court to order a convicted defendant to make restitution only as a condition of probation. Thus, a court imposing a prison term of over six months could not also order restitution .
- If the court decides not to impose restitution or to impose partial restitution, then one subsection of § 3579 requires the court to state on the record why restitution or full restitution was not ordered. Another subsection of § 3579 defines the losses for which a victim may be awarded restitution, and another defines damages. When a property-damage or property-loss offense is involved, the act provides that the court may order the defendant to return the property to the owner or his designee or to pay damages, if return of the property is impossible or impractical.
- This section also authorizes the court, in the case of a bodily injury offense, to order the defendant to pay medical expenses (including expenses relating to psychiatric care and nonmedical care and treatment by a recognized treatment modality) and necessary expenses for physical and occupational therapy, and to reimburse the victim for lost income. Where the offense results in the victim's death, funeral expenses may be required of the defendant, and restitution may be ordered to be paid to a victim's estate. The act also permits the court, with the consent of the victim or victim's estate, to order the defendant to make restitution in services in lieu of money. Provision is also made for payment of restitution to a third party, as to one who has paid the victim's loss, such as an individual or an insurance company, or to a charitable designee.
- In deciding whether and to what extent to order restitution, a court must not only consider fairness to the victim, but also whether the process of ordering full restitution would unduly complicate or prolong the sentencing process. In certain circumstances, the court is authorized to order partial restitution.
- Another subsection of § 3579 provides for restitution to a victim to be set off against compensatory damages recovered by the victim in a federal or state civil proceeding.
- Restitution is to be made within a specified time period or in specified installments, and shall be completed no later than: the end of the probation period, if probation is ordered; five years after the end of a prison term, if the court does not order probation; and five years after the date of sentencing in any other case. If the court does not specify otherwise, restitution must be made immediately.
- Payment of restitution ordered under § 3579 is now a condition of

See VICTIM ACT, page 8

PERSONNEL

Nominations

Frank X. Altimari, U.S. District Judge, E.D. N.Y., Nov. 23
Paul E. Plunkett, U.S. District Judge, N.D. Ill., Nov. 23
Sam H. Bell, U.S. District Judge, N.D. Ohio, Nov. 23
John W. Bissell, U.S. District Judge, D. N.J., Nov. 23
Frank W. Bullock, Jr., U.S. District Judge, M.D. N.C., Nov. 23

Elevation

William T. Hodges, Chief Judge, M.D. Fla., Nov. 15

Correction: Please change listing in your October issue to properly reflect spelling of the following name:

Hubert I. Teitelbaum, Chief Judge, W.D. Pa., Sept. 24

Resignation

Shirley Jones, U.S. District Judge, D. Md., Dec. 31

Senior Status

E. Mac Troutman, U.S. District Judge, E.D. Pa., Sept. 1
Ben Krentzman, U.S. District Judge, M.D. Fla., Nov. 15
Woodrow B. Seals, U.S. District Judge, S.D. Tex., Dec. 25

Death

Roy L. Stephenson, U.S. Circuit Judge, 8th Cir., Nov. 5

VICTIM ACT, from page 7

probation when the restitution is part of the sentence of probation. If the defendant fails to comply with the order, probation may be revoked. A similar provision covers a defendant on parole.

- The act provides for civil enforcement of a restitution order imposed under 18 U.S.C. § 3579 (but not of one imposed under 18 U.S.C. § 3651).
- New § 3580 specifies the following factors that a court must consider in determining whether to order restitution and what amount: the amount of any victim's loss, the financial needs of the defendant and of his family, and the earning capacity of the defendant's dependents. The probation service is charged by the act with the responsibility of collecting such information, which is to be included in the presentence report or in a separate report.
- The same section also requires full disclosure to both defendant and the government's attorney of the data collected in fulfillment of requirements in the paragraph above. As to presentence information potentially exempt from disclosure under F.R. Crim. P. Rule 32(c)(3)(B), section 3580(c) expressly requires the court to disclose to both the defendant and the attorney for the government all portions of the report regarding restitution.
- Approaches to resolving disputes over whether the court should order restitution or over its amount are also laid out by the act. A court shall resolve any dispute by a preponderance of the evidence test. If a dispute concerns the amount of a victim's loss, the prosecution is to have the burden of persuasion. In a dispute regarding the defendant's financial resources or needs, the defendant has the burden of persuasion.
- In addition, a clause in § 3579 estops the defendant from denying the essential allegations resulting in a conviction involving restitution in any subsequent federal or state civil proceeding brought by a victim of the offense.
- Section 6 of the act directs the attorney general, within nine months after enactment of the legislation, to issue and implement guidelines for the fair treatment of federal crime victims and witnesses. When complete, these Fair Treatment Guidelines will have considerable impact on the judicial branch. The attorney general is directed to consider ten objectives in formulating these guidelines: services to crime victims, scheduling of court proceedings, consultation with victims by federal prosecutors, return of property to victims and witnesses, training of law enforcement personnel in victim and witness assistance, and other means of victim and witness assistance.
- Section 7 requires the attorney general, within one year from the act's enactment, to report to Congress on the desirability of enacting a federal "Son of Sam" statute. Several states have implemented such laws to prevent felons from profiting from books, articles, movies, and other media events about the offense until victims of the offense have received restitution.
- Federal court precedents permit a court to revoke bail where a defendant interferes with a government witness. Section 8 of this act amends 18 U.S.C. § 3146(a) to require a judicial officer making a bail determination to condition release of a defendant on the defendant's not committing an offense under the act's new influencing or injuring a witness, tampering, or retaliation provisions (§§ 1512, 1513, 1514). One subsection requires a judge to impose this condition on a defendant released on personal recognizance or on the execution of an unsecured appearance bond; another clause requires imposition of the condition on all other defendants released under § 3146(a). ■

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THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

Index to Volume 14, January-December 1982

Administrative Law
Administrative Conference of U.S. opposition to Bumpers amendment 2:4
Architectural Barriers Act applicability to courtroom spaces 1:5
Attorneys' fee awards in first year of Equal Access to Justice Act 11:2
Freedom of Information Act, increased protection for businesses, ABA resolution 2:2
Relative burden of agency cases in D.C. Cir. 9:2
Rulemaking authority delegation to Judicial Conference of U.S., ABA resolution 2:2
Senator Laxalt's views on judicial review of administrative agencies 7:4

Administrative Office of the U.S. Courts
Appointment of Larry Stoorza, Jr., as assistant director for Management Systems and Services 8:6
Appointment of Theodore J. Lidz as chief, Criminal Justice Act Division 10:5
Drug aftercare program status 10:3
Equal Access to Justice Act, first annual report 11:2
Experiment on electronic sound recording as court-reporting method 11:1
Federal courts' workload during calendar year 1981, report 4:2
Federal Judicial Workload Statistics for the Twelve-Month Period Ended Mar. 31, 1982 8:4
Judicial branch employees, as of June 30, 1982 11:4
Judicial impact statement on diversity jurisdiction abolition 9:1
Peter J. McCabe named assistant director, program management 12:6
Retirement of Carl H. Imlay as general counsel 11:7
William M. Nichols selected as general counsel 12:6

Advocacy
King Committee pilot projects 7:1
Lawyer competence and quality of litigation improvement (Chief Justice's 1981 year-end report) 1:1
Lawyers' lack of preparedness at trial 5:2
Quality of advocacy in federal courts, Justice Stewart's views 1:4

Aircraft Hijackings
Inclusion under Victim and Witness Protection Act of 1982 12:7

Aldisert, Ruggero J.
Judicial Conference recognition of *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* 4:2

Alternatives to Litigation
Chief Justice's Annual Report on the Judiciary, ABA midyear meeting 2:1
Chief Justice's 1981 year-end report 1:1
Chief Justice urges study commission on long-range plans of judicial systems 12:5

American Bar Association
Chief Justice's Annual Report on the Judiciary, ABA midyear meeting 2:1
Deferral of action on (Kutak Commission) Model Rules of Professional Conduct 9:7
House of Delegates resolutions adopted at Aug. 1982 meeting 9:5
Judicial Administration Division's Committee on Courts, materials for judges' speeches 1:5
Resolutions adopted at midyear meetings in Chicago 2:2
Supreme Court justices' speeches on Court workload 9:1

American Enterprise Institute
Sponsor of constitution-writing seminar in 1983 8:5

American Judicature Society
Justice Stevens's speech on Supreme Court workload 9:1

Antitrust
Audiotapes and monograph from Prof. Areeda's University of Michigan law school lectures, summer 1981 12:5
Senator Laxalt's views on contribution and claim reduction in antitrust law 7:5

Areeda, Philip
Antitrust audiotapes and monograph from University of Michigan law school lectures, summer 1981 12:5

Aspen Institute
Human rights seminars for federal judges 7:7

Attorneys' Fees
A.O. first annual report on awards under Equal Access to Justice Act 11:2
Citation for contempt of Attorney General for failure to pay attorneys' fee 10:2
Discovery rules change allowing attorney fee award for expenses incurred in discovery abuse 10:6
Pending legislation on jurors' lawsuits to protect employment rights, ABA resolution 9:5
Provision under Equal Access to Justice Act for appellate proceedings' fee awards, ABA resolution 9:5

Note: The numbers at the right of each column refer to the issue number and page number.

Ju 10. 3/2:

Australia
- Formation of Institute of Judicial Administration 8:1

Automation
- Computer-aided transcription equipment for hearing-impaired parties 7:6
- "Courtran" computer systems for federal court and case management 1:7
- Federal judiciary use (Chief Justice's 1981 year-end report) 1:1
- Machine-readable court records disposition 10:4
- *See also* **Technological Applications**

Bail
- Bail Reform Act revision, legislation 1:8
- Criminal code revisions, Senator Laxalt's views 7:1
- Provisions of Victim and Witness Protection Act relating to bail 12:8

Bankruptcy
- Bankruptcy Court for D. Utah, dual seminars on bankruptcy laws 8:7
- Bankruptcy courts workload statistics for 12-month period ending Mar. 31, 1982 8:4
- Bankruptcy judges' authority under Bankruptcy Reform Act, unconstitutionality 1:5
- Bankruptcy judges' retirement system, ABA resolution 2:2
- Chief Justice urges more efficient administration of bankrupt estates 12:5
- Estate filing increases in 1981 4:2
- Fourth Circuit annual report, 1981 statistics 7:2
- Judicial decisions on unconstitutionality of Bankruptcy Reform Act 5:7
- Proposed rules changes approved by Judicial Conference, Sept. 1982 10:1
- Repayment of debts from future income of debtors, legislation 1:8

Bench-Bar Relations
- Bar Council formation in N.D. Ga. 8:7
- Lawyers Advisory Committee for 3d Cir. 11:4

Bermant, Gordon
- Appointment as FJC director of Innovations and Systems Development Division 1:2
- *The Cases of the United States Court of Appeals for the District of Columbia Circuit* 9:2
- *Jury Selection Procedures in United States District Courts* 10:3

Bicentennial, Constitution
- American Enterprise Institute's 10-year commemoration 8:5

Blumberg, Samuel M., Jr.
- Computer-aided transcription equipment for court reporting 7:6

Board of Certification
- Autumn 1982 interviews for circuit executives 8:3

Brennan, William J.
- Justices' speeches on Supreme Court workload 9:1

Bryant, William B.
- Assignment to Rail Reorganization Court 7:7

Bumpers, Dale
- Federal courts protect constitutional guarantees, speech excerpt 11:5
- On court-stripping proposals, speech excerpt 9:7

Bureaucratization of the Courts
- Court administration delegation to supporting personnel, excerpt from Judge Sneed speech 11:5
- Justice Rehnquist's views on judges' delegation of authority 10:2
- Processing of certiorari petitions by Supreme Court administrative personnel (Justice Stevens) 9:6

Bureau of Justice Statistics
- *Dictionary of Criminal Justice Data Terminology*, new edition 8:7
- Persons in federal institutions compared with persons on parole or probation 11:4
- Prisoner population statistics 7:7
- Prisoners on "death row" 11:8

Bureau of Prisons
- Federal prisoner profile and quarterly data to Mar. 31, 1982 8:2
- Haitian detainees' release from federal institutions 10:5
- Prison population statistics, comparison with Bureau of Justice Statistics figures 7:7
- Suicide prevention program for federal inmates; authorization of force, physical restraints, and chemical agents on inmates 8:3

Busing
- Opposition to antibusing legislation by former Attorneys General and Solicitors General 5:5

Butler, M. Caldwell
- Diversity Jurisdiction Reform Act, status 9:1

Cabinet Council on Legal Affairs
- Establishment by President Reagan 2:1
- Media misreporting on council's role (Rex Lee) 5:6

Cameras in the Courtroom
- *Third Branch* interview with Justice Stewart 1:3

Canal Zone
- U.S. district court closed 6:2

Caseloads
- Chief Justice's "Holiday Message," 1982 12:3
- Justice Rehnquist's views on federal courts' caseloads 10:2
- Justices' speeches on Court workload 9:1
- *Management Statistics for United States Courts—1982* 12:2
- *1982 Annual Report of the Director* of the A.O. 11:1

Case Management
- Scheduling and pretrial conference rules changes adopted by Judicial Conference 10:6

Cases Cited
- *Board of Education of Hendrick Hudson Central School District* v. *Rowley* 7:6
- *Brown* v. *Board of Education* 5:5
- *Callan* v. *Nordland* 7:6
- *Epperson* v. *Arkansas* 5:3
- *Foley* v. *Reagan* 1:5
- *Foley* v. *Reagan* conclusion 3:3

- *Gideon* v. *Wainwright* 1:6; 5:3
- *Garland* v. *Torre* 1:4
- *Immigration and Naturalization Service* v. *Chadha* 5:5
- *In re Gault* 5:3
- *Investment Company Institute* v. *Board of Governors, Federal Reserve System* 4:4
- *Keck* v. *United States* 10:4
- *Mapp* v. *Ohio* 1:4
- *Northern Pipeline Construction Co.* v. *The Marathon Pipeline Co.* 1:5
- *Paralyzed Veterans of America* v. *William F. Smith* 10:2
- *People* v. *Contreras* 7:6
- *Schnapper* v. *Foley* 5:7
- *Tinker* v. *Des Moines School District* 5:3
- *United States* v. *Lespier* 10:4
- *United States* v. *The Marathon Pipeline Co.* 1:5
- *Weeks* v. *United States* 1:4

Chaset, Alan J.
- Appointment as deputy director, FJC Division of Inter-Judicial Affairs and Information Services 12:6

Chief Justice
- Chief Justice's Annual Report on the Judiciary, address to ABA midyear meeting 2:1
- Chief Justice's 1981 year-end report 1:1
- Higher professional ethical standards needed 4:7
- "Holiday Message," 1982 12:3
- Honorary chairman of 1983 constitution-writing seminar 8:5
- Marshals' duties to be shifted 4:1
- Study needed on long-range plans for judicial systems (Arthur Vanderbilt speech) 12:1

Circuit Executives
- Autumn 1983 interviews by Board of Certification 8:3
- William E. Davis appointed circuit executive, 9th Cir. 2:3

Circuit Judicial Conferences
- Dates of circuit conferences 2:3

Civil Appeals Management Plan
- Second Circuit appeals expediting systems, analysis and comparison with Eighth Circuit 1:7
- Second Circuit program assessment 1:5

Civiletti, Benjamin R.
- Opposition to antibusing legislation 5:5

Civil Procedure
- *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 1:7
- *See also* **Federal Rules of Civil Procedure, Practice and Procedure**

Clark, Charles
- Judicial appropriations hearings for FY 1983, statement 3:1

Clark, Ramsey
- Opposition to antibusing legislation 5:5

Coffin, Frank M.
- Anachronistic statutes 10:4
- Coordination of selection of law clerks by federal judges 4:6
- *Third Branch* interview 6:1

Collegiality
- In courts of appeals generally and in the 1st Cir. (Judge Coffin interview) 6:3
- In the Supreme Court (Justice Stewart interview) 1:3

Complex and Protracted Litigation
- *A Checklist of Twenty Techniques to Be Applied in the Trial of Protracted Multi-Defendant Criminal Cases* 12:5
- *Judges' Manual for the Management of Complex Criminal Jury Cases* 10:4
- Judicial Conference, Sept. 1982, recommendation to allow eleven-person juries 10:7

Computers—*See* Automation

Conferences, Institutes, and Seminars
- American Enterprise Institute's constitution-writing seminar 8:5
- Aspen Institute human rights seminars 7:7
- FJC seminar for new appellate judges 9:1
- FJC seminar for newly appointed district judges 3:1
- State-federal judicial councils' agenda 12:4
- Summer 1983 law school programs for judges 11:1; 12:1
- *See also* **American Bar Association, American Judicature Society**

Constitutional Bicentennial
- American Enterprise Institute to sponsor constitution-writing seminar 8:5

Constitutional Law
- Bankruptcy Reform Act unconstitutionality, two court decisions 5:7
- Federal courts protect constitutional guarantees, excerpt of Senator Bumpers's speech 11:5
- Judicial Conference, Sept. 1982, recommendation to allow eleven-person juries in complex trials 10:7
- Judicial Conference, Sept. 1982, recommendation to broaden Fifth Amendment protection for defendants' mental exams 10:7
- Speedy Trial Act proceedings in 4th Cir. 2:5
- Unconstitutionality of Bankruptcy Reform Act declared in *Marathon* 1:5

Continuing Legal Education
- King Committee pilot courts' status 7:1
- Social security seminar for pro bono lawyers in E.D.N.Y., videocassettes 8:7
- *See also* **Judges, Continuing Education**

Corrections, Probation
- Commission on Accreditation for Corrections seminars 1:2
- Education in corrections, excerpt from Gerald Farkas speech 11:5
- Federal prisoner profile and quarterly data to Mar. 31, 1982 8:2
- FJC teleconferences for probation officers on supervising narcotics offenders and white-collar criminals 9:2
- Individuals incarcerated in federal institutions, totals compared to totals of individuals on parole or probation 11:4
- Offense severity scale, proposed changes 8:5

Parolees' employment outlook, two studies 2:2
Penal institutions population 3:3
Prison industries expansion, Chief Justice's support 1:2
Suicide prevention program; authorization of force, physical restraints, and chemical agents on inmates 8:3
A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads 7:2
Victim and Witness Protection Act of 1982, application to federal probation and parole violations 12:1
See also **Prisons and Prisoners**

Court Records—*See* **Documents and Records**

Court Reporting
Computer-aided transcription equipment for hearing-impaired parties, others 7:6
Electronic and alternative recording methods experimentation, role of Judicial Conference 4:5
FJC experiment on electronic sound recording as court-reporting method 11:1

Courts—Administration and Management
Administrative Structures in Large District Courts 4:3
Board of Certification interviews for circuit executives 8:3
The Cases of the United States Court of Appeals for the District of Columbia Circuit 9:2
Chief Justice urges more efficient administration of bankrupt estates 12:5
Civil appeals and criminal appeals expediting systems in 2d Cir. 2:4
Civil appeals management systems, 2d and 8th Circuits 1:7
Justice Rehnquist's views on judges' delegation of authority 10:2
Legal-size paper and file cabinets discontinuance 1:5; 12:2
Management Statistics for United States Courts—1982 12:2

Courts, Circuit (General)
Caseload increases in 1981 4:2
1982 Annual Report of the Director of the A.O. 11:1
1982 Circuit Judicial Conference calendar 2:3
Twelve-month workload statistics (to Mar. 31, 1982) 8:4

Courts, Circuit (First)
Collegiality in 1st Cir. 6:3

Courts, Circuit (Second)
Appeals expediting systems, analysis and comparison with 8th Cir. 1:7
CAMP program assessment 1:5
Civil appeals and criminal appeals expediting systems in 2d Cir. 2:4
1981 annual report of 2d Cir. 2:4

Courts, Circuit (Third)
Third Circuit Journal newsletter begins publication 11:4

Courts, Circuit (Fourth)
Fourth Cir. annual report for 1981 7:2

Courts, Circuit (Fifth)
Chief Justice's 1981 year-end report, 5th Cir. division 1:1

Courts, Circuit (Sixth)
Sixth Cir. annual report 11:7

Courts, Circuit (Seventh)
The Seventh Circuit Preappeal Program: An Evaluation 9:2

Courts, Circuit (Eighth)
Appeals expediting systems, analysis and comparison with 2d Cir. 1:7
Eighth Cir. report on 1980-81 11:6

Courts, Circuit (Ninth)
Ninth Cir. annual report 11:7
Statutory division (Chief Justice's 1981 year-end report) 1:1
William E. Davis becomes circuit executive 2:3

Courts, Circuit (Tenth)
Appeals expediting system analysis 1:7

Courts, Circuit (D.C.)
The Cases of the United States Court of Appeals for the District of Columbia Circuit 9:2

Courts, Circuit (Federal)
U.S. Court of Appeals for the Federal Circuit inauguration, photo story 10:1

Courts, District
Bankruptcy Court for D. Utah, dual seminars on bankruptcy laws 8:7
Bar Council formed in N.D. Ga. 8:7
Caseload increases in 1981 4:2
E.D.N.Y. Pro Bono Litigation Panel 3:1
Equipment for hearing-impaired in new courtrooms of D. Md. 11:3
1982 Annual Report of the Director of the A.O. 11:1
Twelve-month workload statistics (to Mar. 31, 1982) 8:4

Courts, Special
Dudley B. Bonsal named to U.S. Foreign Intelligence Surveillance Court 2:5
Lawrence W. Pierce steps down from U.S. Foreign Intelligence Surveillance Court 2:5
Rail Reorganization Court expansion 7:7

Court Security
Ratio of U.S. marshals per federal judge 8:7
Shifting of marshals' duties under new rule 4, Fed. R. Civ. P. 4:1

Court-Stripping—*See* **Jurisdiction**

Crime
U.S. crime rate in 1981, comparison with 1980 8:5
See also **Drug Abuse, Federal Bureau of Investigation, White-Collar Crime**

Criminal Code Revision
Senator Laxalt's views 7:1

Criminal Law and Justice
Criminal cases filed in 12-month period ending June 30, 1982 11:2
Criminal case filings in U.S. courts for 12-month period ending Mar. 31, 1982 8:4
FBI jurisdiction over drug and related offenses 4:3
Judges' Manual for the Management of Complex Criminal Jury Cases 10:4

Justice Stewart's views on exclusionary rule modification 1:4
Percentage of federal inmates convicted for robbery and associated crimes 8:2
Senator Laxalt's views on criminal code reform 7:1
Supreme Court issues amendments to Fed. R. Crim. P. 8:1

Davis, William E.
Named circuit executive for 9th Cir. 2:3

Demonstration and Pilot Programs
District court executives' pilot programs (Chief Justice's 1981 year-end report) 1:1
King Committee pilot projects' status 7:1

Department of Justice
State prisoners' profile in 1979 compared to federal profile, 1st quarter 1982 8:2

Devitt Award for Distinguished Service
Announcement of annual award to a federal judge 11:4

Discovery
Chief Justice urges study commission on goals of judiciary to explore pretrial procedures 12:5
Litigation reforms (Chief Justice's 1981 year-end report) 1:1
Proposed Fed. R. Civ. P. changes approved by Judicial Conference, Sept. 1982 10:5

Diversity
Diversity jurisdiction legislation, status 9:1

Documents and Records
Judicial Conference proposed changes in records disposition and preservation schedules 4:6
Revised schedule for records disposition approved by Judicial Conference in Sept. 1982 10:4

Dole, Robert
Federal court-reporting hearings in Senate 11:1

Drug Abuse
FBI acquires jurisdiction over drug and related offenses 4:3
Offense severity scale, proposed change for large-scale marijuana offenses 8:5
Percentage of federal inmates convicted of drug law violations 8:2
Prosecutions in 12-month period ending June 30, 1982, A.O. annual report 11:2
Prosecutions under Drug Abuse Prevention and Control Act for 12-month period ending Mar. 31, 1982 8:4
South Florida Task Force formation 6:1
Video teleconference on supervising narcotics offenders 9:2

Drug Aftercare Program
FJC evaluation of contract services for drug-dependent federal offenders 11:3
Reactivation of program by A.O. director 10:3

Education for All Handicapped Children Act
Test in Supreme Court *Rowley* case 7:6

Equal Access to Justice Act
A.O. first annual report on attorneys' fees awarded under act 11:2

Ethics in Government Act
Senator Laxalt's views on special prosecutor provisions 7:4
Special prosecutor provisions extension, ABA resolution 9:5

Exclusionary Rule
Judge Stewart's views on exclusionary rule modification 1:4

Fair Trial and Free Press Report
Amendment on cameras in the courtroom, ABA resolution 9:5

Farkas, Gerald M.
Education in corrections, speech excerpt 11:5

Federal Bureau of Investigation
Uniform Crime Reports data on 1982 8:5

Federal Courts Improvement Act
Judicial Conference assigned to experiment with alternative court-reporting methods 11:1
Presidential signing ceremony, photo story 5:1
Summary of act 4:1

Federal Judicial Center
Judicial branch employees, as of June 30, 1982 11:4
Newly appointed district judges' seminar, dates 3:1
Seminar for newly appointed appellate judges, announcement 9:1
Sponsorship of judges' enrollment in summer 1983 law school programs 11:1
Warren K. Urbom elected to FJC Board of Directors 8:1
See also **Publications and Audio and Video Cassettes**

Federal Public Defenders
Appointment by courts of appeals 4:5
Court records' disposition 10:4

Federal Rules of Appellate Procedure
Change in docketing of appeals, impact on workload statistics 8:4

Federal Rules of Civil Procedure
Delay by Congress in enactment of changes to rule 4, Fed. R. Civ. P. 8:6
Proposed rules changes approved by Judicial Conference, Sept. 1982 10:1
Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 1:7
Supreme Court issues rules amendments 8:1
See also **Practice and Procedure**

Federal Rules of Criminal Procedure
Proposed rules changes approved by Judicial Conference, Sept. 1982 10:1
Supreme Court issues rules amendments, including waiver of venue in rule 20(b) 8:1

Feikens, John
Judges' Manual for the Management of Complex Criminal Jury Cases 10:4

Financial Disclosure
Federal judges' statements revisions 4:1
Revisions to reporting form for judiciary and high-level judicial employees 10:1

First Amendment
Cameras in the courtroom proposed in ABA resolution 9:5
Free press, free speech issues, Justice Stewart's views 1:4

Fortas, Abe
In memoriam 5:3

- **Fox, Russell**
  - Chairman, Australian Institute of Judicial Administration 8:6
- **Friendly, Fred W.**
  - Judges' duty to speak out on court-stripping initiatives 2:3
- **Friendly, Henry J.**
  - Rail Reorganization Court appointment 7:7
- **Gasch, Oliver**
  - Rail Reorganization Court appointment 7:7
- **General Accounting Office**
  - Electronic sound recording as court-reporting method 11:1
- **General Services Administration**
  - Availability of legal-size office furniture at Federal Property Resources Service 12:2
  - Security services reorganization 4:1
  - Space charges to judiciary, and reduction in building services 3:2
- **Griswold, Erwin N.**
  - Opposition to antibusing legislation 5:5
- **Habeas Corpus**
  - Review of state court convictions, Justice Stewart's views 1:6
  - Rule change in prisoners' petitions removing requirement of sworn affidavit 8:6
  - State prisoner petition restriction, ABA resolution 9:8
- **Haitians**
  - Detainees held in federal penal institutions 7:7
  - Release order by Judge Spellman 10:5
- **Handicapped**
  - Architectural Barriers Act applicability to courtroom spaces 1:5
  - Attorneys' fee award for Greater Los Angeles Council on Deafness, Inc. 11:2
  - Closed loop antennas for hearing-impaired in new courtrooms in D. Md. 11:3
  - Computer-aided transcription equipment aids for hearing-impaired 7:6
  - Courtroom sites in Atlanta Federal Courthouse, compliance with Architectural Barriers Act 1:5
- **Heflin, Howell**
  - Experiment to test electronic sound recording as court-reporting method 11:5
  - Legislation to form study commission on state-federal court jurisdiction 7:3
- **Hodges, William Terrell**
  - *A Checklist of Twenty Techniques to Be Applied in the Trial of Protracted Multi-Defendant Criminal Cases* 12:5
- **Horney, Julie**
  - Judicial Fellows selection for 1982-83 9:3
- **Imlay, Carl H.**
  - Retirement as general counsel to the A.O. 11:7
- **Immigration and Naturalization Service**
  - Haitian and Cuban detainees in federal institutions 7:7
  - Haitian detainees' release 10:5
- **Individual Retirement Accounts**
  - Investments in collectibles disallowed 1:3
- **Insanity Defense**
  - Television interview with Judge Barrington D. Parker 11:4
- **Intercircuit Conflicts**
  - Chief Justice urges study commission on long-range plans of judicial systems 12:5
- **Jacoubovitch, M.-Daniel**
  - *Summary Jury Trials in the Northern District of Ohio* 10:3
- **Judges, Continuing Education**
  - Columbia University Law School professional development program, FJC funds for judges 1:8
  - FJC seminar for newly appointed appellate judges 9:1
  - FJC seminar for newly appointed district judges 3:1
  - FJC support for judges at summer 1983 law school programs for judges 11:1; 12:1
  - Human rights seminars for judges 7:7
  - University of Virginia Graduate Program for Judges 1:8
  - Video orientations for newly appointed district judges 7:3
- **Judges, Federal**
  - *Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures* 9:4
  - Chief Justice's 1981 year-end report 1:1
  - FJC seminar for newly appointed appellate judges 9:1
  - Judicial Conference, Sept. 1982, recommendations for additional judgeships 10:4
  - Judicial vacancies in 2d Cir., 1981 2:4
  - Justice Rehnquist's views on effects of enlarging judiciary 10:2
  - *Management Statistics for United States Courts—1982* 12:2
  - New judgeships during 1982, Chief Justice's "Holiday Message" 12:3
  - Official travel and expenses remuneration 4:5
- **Judicial Activism**
  - Judge Coffin's views 6:3
  - Justice Stewart's views 1:3
  - Senator Laxalt's views 7:3
- **Judicial Administration**
  - *Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures* 1:7
  - Courtran computer system for federal court and case management 1:7
  - *Judges' Manual for the Management of Complex Criminal Jury Cases* 10:4
  - Legislation to form commission to study future of the judiciary 10:4
  - *Summary Jury Trials in the Northern District of Ohio* 10:3
- **Judicial Conference of the U.S.**
  - Adoption of standard-size paper 1:5
  - Federal courts' switchover to letter-size paper and files 12:2
  - FJC experiment on electronic sound recording as court-reporting method 11:1
  - Judiciary budget role 3:2
  - Mar. 1982 semi-annual meeting actions 4:1
  - Recommendations and proposed rules changes adopted at Sept. 1982 meetings 10:1
  - Rulemaking processes, ABA resolutions 2:2

Judicial Discipline
  Higher professional ethical standards needed, Chief Justice's views 4:7
Judicial Ethics
  Cameras in the courtroom, ABA resolution 9:5
  Financial disclosure form revisions 4:1
  Revisions to financial disclosure reporting form for judiciary and high-level judicial employees 10:1
Judicial Fellows
  Appointments for 1982-83 9:3
Judicial Review
  Judge Coffin's views 6:3
  Senator Laxalt's views on court review of regulatory agencies' rulemaking 7:4
Judicial Salaries
  Bankruptcy judges' retirement benefits, legislation 1:8
  Chief Justice's 1981 year-end report 1:1
  Federal group health insurance policies open season and rate increases 12:4
  Foley v. *Reagan* 1:5
  Foley v. *Reagan* litigation conclusion 3:3
  Judicial Conference recommendations for judicial survivors' benefits, retirement plans 4:1
  Legislation to require Congress's specific authorizations for judicial salary increases, or to require biennial review of salaries 4:6
  U.S. employees' Medicare tax deductions 12:4
Judicial Security
  Judge Clark expressed Judicial Conference's concern over inadequacy of court security 3:2
  Judicial Conference actions to improve court security 4:1
Judicial Selection and Tenure
  Limitation on chief judges' tenure 4:4
Judiciary, Appropriations
  Budget requests for FY 1983 3:1
  Senator Laxalt's views on budgetary process 7:5
Juries
  Chief Justice urges limits on jury selection process 12:5
  Improved juror utilization expenses 3:2
  Judges' Manual for the Management of Complex Criminal Jury Cases 10:4
  Judicial Conference positions on: right to jury trials in land condemnation cases; conduct of voir dire by parties; presence of counsel in grand jury room 4:6
  Judicial Conference proposed new rules for grand juries 10:1
  Judicial Conference recommendation to allow eleven-person jury in complex criminal trial 10:1
  Jurors' efficiency and utilization (Chief Justice's 1981 year-end report) 1:1
  Jury awards in personal injury cases 8:7
  Jury Selection Procedures in United States District Courts 10:3
  Legislation regarding work injuries to federal jurors, ABA resolution 9:5
  Model grand jury act, ABA resolution 2:2
  Summary Jury Trials in the Northern District of Ohio 10:3
Jurisdiction
  Bankruptcy judges' authority under Bankruptcy Reform Act, unconstitutionality 1:5
  Chief Justice urges diversity jurisdiction elimination 12:5
  Collateral review of state criminal convictions, Justice Stewart's views 1:6
  Court-stripping proposals, Justice Stewart's views 1:6
  Diversity jurisdiction legislation 9:1
  Fred Friendly on court-stripping proposals 2:3
  Judge Kaufman on court-stripping proposals 2:3
  Judicial Conference recommendations for U.S. magistrates' jurisdiction 4:7
  New courts proposals, Justice Stewart's views 1:6
  New rules for two panels in Rail Reorganization Court 7:7
  Supreme Court mandatory appellate jurisdiction (Chief Justice's 1981 year-end report) 1:1
  Transfer of civil action to appropriate forum, passage of legislation 4:4
  Unconstitutionality of Bankruptcy Reform Act, court decisions 5:7
  U.S. Court of Appeals for the Federal Circuit and U.S. Claims Court, jurisdiction 4:1
Jury Verdict Research, Inc.
  Jury awards in personal injury cases 8:7
Karlovits, Joseph R.
  Computer-aided transcription equipment for court reporting 7:6
Kastenmeier, Robert W.
  Diversity Jurisdiction Reform Act status 9:1
Katzenbach, Nicholas deB.
  Opposition to antibusing legislation 5:5
Kaufman, Irving R.
  CAMP program in 2d Cir. 1:5
  Judges' duty to speak out on court-stripping proposals, two articles 2:3
  Judiciary and corrections funding inadequacy 9:7
Kelley, Ralph H.
  Ruling on unconstitutionality of Bankruptcy Reform Act 5:7
King, James Lawrence
  King Committee pilot projects 7:1
Kutak, Robert J.
  ABA deferral of action on Model Rules of Professional Conduct 9:7
Lambros, Thomas
  Summary jury trials in N. D. Ohio 10:3
Law Clerks
  Judicial Conference study group on selection of law clerks by federal judges 4:6
  Supreme Court clerks' law schools 9:7
  Supreme Court justices' clerks, Justice Stewart's views 1:3
  Supreme Court selections for 1982-83 8:2
Law Day
  Law Day, May 1, 1982 3:2
Law Enforcement Assistance Administration
  Closing 5:1

Law-Related Education
  Bibliography of free and inexpensive teaching materials in ABA report 3:3
Law Schools
  ABA accreditation for law schools using religion standards 2:2
  Clinical programs cutback 4:5
  Higher standards of responsibility needed for legal profession, Chief Justice's views 4:7
  Law school enrollments rise 5:3
  Training in alternative dispute-solving mechanisms, Chief Justice's Annual Report on the Judiciary 2:1
Lawyers Committee for International Human Rights
  Human rights seminars for federal judges 7:7
Laxalt, Paul
  Third Branch interview 7:1
Lee, Rex E.
  Third Branch interview 5:1
  Selection of cases for petitioning Supreme Court, as Solicitor General 5:4
Legal Services
  Pro bono panel in E.D.N.Y. 3:1
  Pro bono panel of attorneys in E.D. Pa. 4:2
Legal-Size Documents
  Elimination of legal-size paper and files, effective date Jan. 1, 1983 1:5; 12:2
Legislation
  Bail Reform Act revision, legislation 1:8
  Criminal code revision proposals, Senator Laxalt's comments 7:1
  Diversity Jurisdiction Reform Act status 9:1
  Drug aftercare program status 10:3
  Enactment of Victim and Witness Protection Act of 1982 12:1
  Federal Courts Improvement Act passed by Senate 1:8
  Judicial Conference recommendations on 97th Congress legislation 4:1
  Ninety-seventh Congress legislation 1:8
  Pretrial services expansion to all judicial districts 10:3
  Repayment of debts from future income of debtors, legislation 1:8
  Senate passage of bill to establish commission to study court systems 12:5
Lidz, Theodore J.
  Appointment as chief, A.O. Criminal Justice Act Division 10:5
Lombard, Patricia A.
  The Cases of the United States Court of Appeals for the District of Columbia Circuit 9:2
Lord, Joseph S., III
  Letter to the editor: pro bono panel in E.D. Pa. 4:2
Lord, Miles W.
  Bankruptcy Reform Act held unconstitutional 1:5; 5:7
McCabe, Peter G.
  Appointment as A.O. assistant director for program management 12:6
McCree, Wade H., Jr.
  Opposition to antibusing legislation 5:5
McGurn, Barrett
  Retirement from public information office, Supreme Court 5:7
  Supreme Court justices' law clerks, history 8:2
Macro Systems, Inc.
  Evaluation of contract services for drug-dependent federal offenders 11:3
Magistrates
  Judicial branch employees by categories, as of June 30, 1982 11:4
  Judicial Conference recommendation on magistrates' retirement benefits 4:6
  Judicial Conference, Sept. 1982, recommendations for additional magistrates 10:3
  Judicial Conference, Sept. 1982, recommendations to amend federal rules pertaining to magistrates 10:7
  Justice Rehnquist's views on bureaucratization of federal courts 10:2
  Report on magistrates system submitted to Congress 4:7
  Responsibilities of magistrates under Victim and Witness Protection Act of 1982 12:1
  Second Circuit increases in activity by U.S. magistrates 2:4
Markey, Howard T.
  Chief Judge of U.S. Court of Appeals for the Federal Circuit 4:4
  Reelection to Board of Certification 4:6
Marshall, Thurgood
  Justices' speeches on Supreme Court workload 9:1
Marshals Service
  Ratio of marshals per federal judge 8:7
  Security services for the judiciary, other duties of marshals shifted 4:1
Media and the Courts
  Cameras in the courtroom, ABA resolution 9:5
  Cameras in the courtroom, Justice Stewart's views 1:3
  Fred Friendly urges judges to speak out on court-stripping proposals 2:3
  Free speech and free press issues, Justice Stewart's views 1:4
  Judge Irving Kaufman urges judges to speak out on court-stripping initiatives 2:3
  Judicial Conference, Sept. 1982, deferral of action on proposed rule on closing pretrial proceedings to press 10:8
Megan, Thomas I.
  Architectural Barriers Act inapplicability to courtroom sites 1:5
Minorities
  Blacks, Hispanics in federal and state penal institutions, comparison 8:1
  Prisoners on "death row" in 1981 11:8
  Racist criticisms directed at Judge Barrington D. Parker 11:4
Moore, Carl M.
  Summary Jury Trials in the Northern District of Ohio 10:3

Moran, James B.
- Oral Roberts University law school accreditation by ABA, district court holding 2:2

Motion Practice
- Judicial Conference, Sept. 1982, recommendations on sanctions for improper motion practice 10:6

National Academy of Public Administration
- Judicial Fellows Program 9:3

National Archives and Records Service
- Court records disposition 10:4

National Shorthand Reporters Association
- Task Force on Testing Guidelines for Alternative Court Reporting Systems 11:5

Nichols, William M.
- Selection as A.O. general counsel 12:6

Nihan, Charles W.
- *Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures* 9:4

O'Brien, David
- Judicial Fellows selections for 1982-83 9:3

Panama Canal
- U.S. district court closed 6:2

Perlstein, Jolanta J.
- Judicial Fellows selection for 1982-83 9:3

Plotnikoff, Joyce H.
- Tom C. Clark Judicial Fellow (photo story) 5:3

Post-Judgment Interest
- New basis for calculation of interest on money judgments 4:1

Powell, Lewis F., Jr.
- Justice Rehnquist's views on bureaucratization of federal courts 10:2
- Supreme Court justices' speeches on court workload 9:1

Practice and Procedure
- FJC publications on jury selection procedure and summary jury trial techniques 10:3
- *Judges' Manual for the Management of Complex Criminal Jury Cases* 10:4
- Judicial Conference proposes change to rule 4, Fed. R. Civ. P. 4:1; 4:3
- Pro bono panel in E.D.N.Y. 3:1
- Pro bono panel in E.D. Pa. 4:2
- Proposed rules changes approved by Judicial Conference, Sept. 1982 10:1
- Provisions of Victim and Witness Protection Act of 1982 12:1
- Publication of local rules and internal operating procedures by courts of appeals 4:4
- *See also* **Civil Appeals Management Plan, Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Judicial Administration, Juries**

Presentence Reports
- Judicial Conference, Sept. 1982, recommendations for changes 10:8
- Senator Laxalt's views on pending legislation 7:3
- Victim and Witness Protection Act of 1982 requirements 12:1

Pretrial Detention
- Dangerousness to community standard, legislation 1:8

Pretrial Services
- Victim and Witness Protection Act of 1982, presentence report requirements 12:1

Prisons and Prisoners
- Aldisert Committee report on prisoner civil rights, Judicial Conference recognition 4:2
- Awards for business advisory committee aiding Danbury prison industry program 4:5
- Commission on Accreditation for Corrections seminars 1:2
- Death-row total increases 11:8
- Education in corrections, excerpt from Gerald Farkas speech 11:5
- Federal prisoner profile and quarterly data to Mar. 31, 1982 8:2
- FJC teleconferences for probation officers on supervision of narcotics offenders and white-collar criminals 9:2
- Fourth Circuit statistics on prisoner petitions 7:2
- Individuals incarcerated in federal institutions compared to individuals on parole or probation 11:4
- Offense severity scale, proposed changes 8:5
- Parolees' employment outlook, two studies 2:2
- Penal institutions population 3:3
- Prisoners on death row, 1981 11:8
- Prison industries (Chief Justice's University of Nebraska speech) 1:2
- Prison population statistics conflict 7:7
- Rule change in prisoners' petition, removing requirement for sworn affidavit 8:6
- Suicide prevention program; authorization of force, physical restraints, and chemical agents on inmates 8:3
- *A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads* 7:2

Pro Bono Services
- E.D.N.Y. pro bono panels 3:1
- E.D. Pa. pro bono panel of attorneys 4:2
- Lawyers give pro bono aid to Haitian detainees 10:5
- Social security seminar for pro bono lawyers, videocassettes 8:7

Professional Ethics
- ABA deferral of action on Model Rules of Professional Conduct 9:7
- Higher standards of responsibility needed for legal profession (Chief Justice) 4:7
- Proposed new Model Rules of Professional Conduct, ABA midyear action 2:2

Publications and Audio and Video Cassettes
- *Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures* 9:4
- *Administrative Structures in Large District Courts* 4:3
- Antitrust audiotapes of Philip Areeda's lectures at University of Michigan, 1981 12:5
- *Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures* 1:7

  - Bibliography of free and inexpensive law-related education materials 3:3
  - *The Cases of the United States Court of Appeals for the District of Columbia Circuit* 9:2
  - *A Checklist of Twenty Techniques to Be Applied in the Trial of Protracted Multi-Defendant Criminal Cases* 12:5
  - *Crime in the United States—1981* (FBI) 8:5
  - *Dictionary of Criminal Justice Data Terminology,* new edition, Bureau of Justice Statistics 8:7
  - *Equal Justice Under the Law* series, copyright ruling 5:7
  - *An Evaluation of Limited Publication in the United States Courts of Appeals—The Price of Reform* 1:7
  - *Experimentation in the Law,* price change 1:7
  - *Federal Judicial Workload Statistics for the Twelve-Month Period Ended Mar. 31, 1982* 8:4
  - *Judges' Manual for the Management of Complex Criminal Jury Cases* 10:4
  - Judicial Conference recognition of *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* 4:2
  - *Jury Selection Procedures in United States District Courts* 10:3
  - *Management Statistics for United States Courts—1982* 12:2
  - *Manual for Complex Litigation,* fifth edition 7:2
  - *1982 Annual Report of the Director* of the A.O. 11:1
  - *The "Rule of Reason" in Antitrust Analysis: General Issues* 12:5
  - *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 1:7
  - *The Seventh Circuit Preappeal Program: An Evaluation* 9:2
  - Social security seminar for pro bono lawyers in E.D.N.Y., videocassettes 8:7
  - *Summary Jury Trials in the Northern District of Ohio* 10:3
  - *Third Circuit Journal,* newsletter begins 11:4
  - *Using Technology to Improve the Administration of Justice in the Federal Courts* 1:7
  - *A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads* 7:2

- **Racketeer Influenced and Corrupt Organizations Act**
  - Proposed revisions, ABA resolution 9:8
- **Rail Reorganization Court**
  - Three additional judges named 7:7
- **Rankin, J. Lee**
  - Opposition to antibusing legislation 5:5
- **Records Management**—*See* **Documents and Records**
- **Rehnquist, William H.**
  - Effects of increasing judgeships and of delegation of judges' authority 10:2
  - Law clerks for 1982-83 8:2
- **Renshaw, Benjamin H., IV**
  - Prisoners on death row, 1981 11:8
- **Restitution**
  - Senator Laxalt's views on pending legislation 7:3
  - Victim and Witness Protection Act of 1982 12:1
- **Richardson, Elliot L.**
  - Opposition to antibusing legislation 5:5
- **Rosenberg, Maurice**
  - CAMP program in 2d Cir. 1:5
- **Rulemaking**
  - Chief Justice's 1981 year-end report 1:1
  - Rulemaking authority delegation to Judicial Conference of U.S., ABA resolution 2:2
  - *See also* **Administrative Law**
- **Salaries**—*See* **Judicial Salaries**
- **Sentencing**
  - Criminal code revision, Senator Laxalt's views 7:1
- **Seron, Carroll**
  - *The Cases of the United States Court of Appeals for the District of Columbia Circuit* 9:2
- **Service of Process**
  - Delay by Congress in enactment of changes to rule 4, Fed. R. Civ. P. 8:6
  - Pending legislation on service of summonses by mail, ABA resolution 9:5
  - Proposed changes to rule 4, Fed. R. Civ. P. 4:3
- **Smith, John Lewis**
  - *Foley* v. *Reagan* litigation conclusion 3:3
  - Judicial salary increase litigation 1:5
- **Smith, Neal**
  - Advocacy of law school clinical programs 4:5
  - Chairman of House Appropriations subcommittee overseeing the judiciary 3:1
- **Smith, William French**
  - Chairman of Cabinet Council on Legal Affairs 2:1
  - Citation for contempt of court 10:2
  - Judicial "overreaching," *ABA Journal* article 2:5
  - Jurisdictional reorganization for drug and related crimes 4:3
  - Workload problems of the judiciary 9:7
- **Smuggling**
  - Judicial Conference recommendation for legislation to broaden smuggling definition 10:4
- **Sneed, Joseph T.**
  - Bureaucratization of the judiciary 11:5
  - Independence of the judiciary 9:7
- **Social Security**
  - Social security disability benefits appeals, use of pro bono panel in E.D.N.Y. 3:3
  - U.S. employees' Medicare tax deductions 12:4
- **Sonnett, Neal**
  - Pro bono services of lawyers for Haitian detainees 10:5
- **South Florida Task Force on Crime**
  - U.S. judges to rotate on tours to South Florida 6:1
  - Visiting judges' assistance, plaudits from Chief Justice 12:3
- **Special Prosecutor**
  - Senator Laxalt's views on Ethics in Government Act standards 7:4
  - Special prosecutor legislation extension, ABA resolution 9:5
- **Speedy Trial Act**
  - Fourth Circuit holds act invalid 2:5
- **Spellman, Eugene**
  - Order to release Haitian detainees 10:5
- **State Courts**
  - Federal-state conflicts, Justice Stewart's views 1:6

State-Federal Relations
  Federal courts' review of state criminal convictions, Justice Stewart's views 1:6
  Judicial Conference Subcommittee on State-Federal Relations formed 12:4
  Justice Rehnquist's views on federal courts' review of state court decisions 10:2
  LEAA funds for state court improvement and state law enforcement programs 5:1
  Senator Laxalt's views on federal jurisdiction enlargement, on state-federal study commission legislation, and on diversity jurisdiction 7:3
  State-federal judicial councils, roundup 12:4
  See also **Diversity Jurisdiction**
State Justice Institute
  Pending legislation 5:2
Statistics
  Australian Institute of Judicial Administration analysis of court delays 8:6
  The Cases of the United States Court of Appeals for the District of Columbia Circuit 9:4
  Chief Justice's Annual Report on the Judiciary 2:1
  Eighth Circuit report for 1980-81 11:6
  Federal courts 12-month statistics to Mar. 31, 1982 8:4
  Federal courts' workload in calendar year 1981, A.O. report 4:2
  Fourth Circuit annual report for 1981 7:2
  Judicial branch employees by categories, totals on June 30, 1982 11:4
  Management Statistics for United States Courts—1982 12:2
  1982 Annual Report of the Director of the A.O. 11:1
  Penal institutions population as of Sept. 30, 1981 3:3
  Prison population statistics comparison 7:7
  Second Circuit annual report 2:4
  Sixth and Ninth Circuits' annual reports 11:7
  U.S. crime rate in 1981 compared to 1980 8:5
Stevens, John Paul
  Law clerks for 1982-83 8:2
  Justice Rehnquist's response to Justice Stevens's comments on bureaucratization 10:2
  Justices' speeches on Court workload 9:1
Stewart, Potter
  Selection of law clerk at Supreme Court 8:2
  Third Branch interview 1:1
Stoorza, Edwin L., Jr.
  Appointment as A.O. assistant director for Management Systems and Services 8:6
Supporting Personnel
  Appellate court staff appointments, passage of legislation 4:4
  Court administration bureaucratization, Judge Sneed's views 11:5
  Group health insurance open season and rate increases 12:4
  Judicial branch employees by categories, totals on June 30, 1982 11:4
  Judiciary budget requests for FY 1983 3:2
  Justice Rehnquist's views on bureaucratization of federal courts 10:2
  See also **Bureaucratization, Circuit Executives, Magistrates, Marshals Service, U.S. Probation Officers**
Supreme Court
  Computer-aided transcription equipment for hearing-impaired parties 7:6
  Justice Rehnquist's views on caseload burdens 10:2
  Justices' speeches on Court workload 9:1
  Law clerks' law schools 9:7
  Law clerks selection for 1982-83 8:2
  Mandatory appellate jurisdiction, elimination (Chief Justice's 1981 year-end report) 1:1
  Rules amendments for Fed. R. Civ. P., Fed. R. Crim. P., and 28 U.S.C. §§ 2254, 2255 8:1
  Third Branch interview with Justice Stewart 1:3
Technological Applications
  Closed loop antennas for hearing-impaired in new courtrooms in D. Md. 11:3
  Electronic and alternative recording methods 4:5
  Video teleconferences on supervision of narcotics offenders and white-collar criminals 9:2
Temporary Restraining Orders
  Authorization for federal court to issue TROs to prevent harassment of victim or witness 12:7
Thomsen, Roszel C.
  Rail Reorganization Act appointment 7:7
Thurmond, Strom
  Criminal code revision changes in 97th Congress 7:1
United States Court Reporters Association
  Computer-aided transcription equipment for court reporting 7:6
  Task Force on Testing Guidelines for Alternative Court Reporting Systems 11:5
University of Nebraska
  Chief Justice's speech on prison industries 1:2
Urbom, Warren K.
  Election to FJC Board 8:1
U.S. Claims Court
  Effective date, jurisdiction 4:1
U.S. Court of Appeals for the Federal Circuit
  Admission to bar; planning and new rules 5:7
  Effective date; jurisdiction 4:1
  Inauguration ceremony (photo story) 10:1
U.S. Parole Commission
  Criminal code revision, Senator Laxalt's views 7:1
  Offense severity scale, proposed changes 8:5
U.S. Probation Officers
  Judicial Conference, Sept. 1982, recommendations for additional probation officers 10:4
  Responsibilities under Victim and Witness Protection Act of 1982 12:1
Venue
  Amendment to rule 20(b), Fed. R. Crim. P., to allow waiver of venue 8:1
  Judicial Conference position on divisional venue in civil cases 4:6

Victim and Witness Protection Act of 1982
  Enactment as P.L. 97-291 12:1
Victim Impact Statements
  Requirement in presentence reports 12:1
  Senator Laxalt's views on pending legislation 7:3
Voting Rights
  Voting Rights Act extension, House passage 1:8
Weinstein, Jack B.
  Pro bono panel in E.D.N.Y. 3:1
  Social security seminar for pro bono lawyers in E.D.N.Y., videocassettes 8:7
Wheeler, Russell R.
  Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures 9:4
  Appointment as deputy director, FJC Continuing Education and Training Division 12:6
White, Byron R.
  Justices' speeches on Supreme Court workload 9:1
White-Collar Crime
  Video teleconference on supervision of white-collar criminals 9:2
Wiener, Charles R.
  Assignment to Rail Reorganization Court 7:7
Wisdom, John Minor
  Rail Reorganization Court role 7:7
With, Jere
  Computer-aided transcription for hearing-impaired 7:6
Witness Intimidation
  Senator Laxalt's views on pending legislation 7:3
Young, Joseph H.
  Speedy Trial Act ruling 2:5

BULLETIN OF THE FEDERAL COURTS
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Index to Volume 14

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